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IN THE

Supreme Court of the United States

October Term, 1980

THE ENVIRONMENTAL DEFENSE FUND, THE NATIONAL AUDUBON SOCIETY, THE BIRMINGHAM AUDUBON SOCIETY, THE ALABAMA CONSERVANCY, *et al.*,

Petitioners,

v.

CLIFFORD L. ALEXANDER, SECRETARY OF THE ARMY, THE UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JON T. BROWN
STEPHEN E. ROADY
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 466-6142
Counsel for Petitioners

JAMES T. B. TRIPP
475 Park Avenue, South
New York, New York 10016
(212) 686-4191
Counsel for Petitioner
Environmental Defense Fund

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

QUESTIONS PRESENTED

1. Can a federal agency that is constructing a massive, unauthorized navigation project in violation of the Commerce Clause and at public expense be prejudiced by being required to seek the necessary project authorization from the Congress?

2. Under *TVA v. Hill,* does a federal agency enjoy unbridled discretion to complete construction of an unfinished water resources project that is being built in violation of clear Constitutional and Congressional mandates?

LIST OF PARTIES TO THE PROCEEDING BELOW

A. Plaintiffs

1. The Environmental Defense Fund
2. The Committee for Leaving the Environment of American Natural
3. The Louisville and Nashville Railroad Company
4. The National Audubon Society
5. The Birmingham Audubon Society
6. The Alabama Conservancy
7. Dr. Glenn H. Clemmer
8. Mr. G. Randall Grace
9. Dr. F. Glenn Liming

B. Defendants

1. Clifford Alexander, Secretary of the Army
2. The United States Army Corps of Engineers
3. The State of Alabama
4. The Tennessee-Tombigbee Waterway Development Authority
5. The Tombigbee River Valley Water Management District

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Environmental Defense Fund, the National Audubon Society, the Birmingham Audubon Society, the Alabama Conservancy, and the individual petitioners respectfully petition this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 614 F.2d 474 (5th Cir. 1980) and is reproduced in the Appendix. The opinion of the district court is officially reported at 467 F.Supp. 885, and is also reproduced in the Appendix (hereafter "App.").

JURISDICTION

The judgment of the Court of Appeals was entered on March 24, 1980. A timely petition for rehearing *en banc* was denied on April 22, 1980. This petition is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the United States Constitution, Article I, Section 8, Clause 3, the Rivers and Harbors Act of 1899, Section 9, 33 U.S.C. § 401, the Act of August 18, 1941, Section 2, 33 U.S.C. § 701m, the Act of September 3, 1954, Section 202, 33 U.S.C. § 701b-8, and the Water Resources Development Act of 1976, Section 131, 42 U.S.C. § 1962d-5 are reproduced in the Appendix.

STATEMENT OF THE CASE

A. Introduction

At issue in this case is the question whether the United States Army Corps of Engineers can expend billions of dollars on a public works navigation project in the absence of Congressional authorization.

In 1951, the Corps explicitly promised the Congress that it would seek prior federal legislation in the event that it

desired to expand the width and capacity of the Tennessee-Tombigbee Waterway project, a barge canal designed to parallel the Mississippi River through northeastern Mississippi and western Alabama. This promise was consistent with the traditional limits on the scope of authority granted by the Congress to the Corps to make post-authorization modifications of navigation projects. Yet in 1972 the Corps began construction of the expanded project at a dramatically-increased width even though Congress had not authorized such a new project. The expanded width of the project more than doubles its commodity-carrying capacity, and will have a significant effect upon interstate commerce in the area, as well as upon the regional environment.

To support its claim that the larger project is in fact authorized the Corps relies on a one-sentence memorandum executed by the Secretary of the Army in 1967 and on continuing Congressional appropriations for the larger project.

The district court ruled that the question whether the Secretary of the Army enjoys discretionary authority to expand the width of the project from 170 to 300 feet is one of first impression, but left that issue unresolved. 467 F.Supp. at 908. An unbroken chain of precedent holds that the authority to make such sweeping post-authorization modifications has been entrusted solely to the Congress.

Moreover, although the Congress has appropriated money for the project each year since 1971, none of the appropriation acts has included any reference to, let alone authority for, the increase in channel width. 467 F.Supp. at 898. Nor has any other Congressional legislation made reference to the increase in channel width.

In the face of this history, the decision below concluded that the Corps of Engineers would be unduly prejudiced if it were forced to suspend work on the project and return to the Congress for authorization. It therefore affirmed the district court and barred this action on the ground of laches. In so doing the decision ignored the law and created a precedent which has grave consequences as a matter of public policy.

The apparent basis for this finding of undue prejudice was the determination that the Corps had spent approximately 11% of the cost of actual project construction at the time the authority question was raised. App. 13a. Thus, the question for this Court is whether a Federal agency can be permitted to construct a multi-billion dollar navigation project having serious interstate commerce impacts in the absence of Congressional authorization merely because a portion of the project is under construction at the time the litigation begins.

B. Facts

The Tennessee-Tombigbee Waterway project (TTWW) was authorized in the Rivers and Harbors Act of 1946, P.L. 79-525, in accordance with the plans and subject to the conditions set out in House Document 486. App. 27a.

As described in House Document 486 and its predecessor, House Document 269, the project was designed to provide two-way barge traffic along a navigation channel with a bottom width of 170 feet in river and canal sections and 150 feet in the divide cut section between Demopolis, Alabama and the Pickwick Pool on the Tennessee River. App. 25a, 31a, 32a.

In 1950 and 1951, the House Appropriations Committee conducted an investigation of the Civil Works Program of

the Corps of Engineers in general, and examined the TTWW project in particular. In January 1951, the Corps of Engineers advised the Committee:

> The Tennessee-Tombigbee Waterway is authorized for a width of 170 feet. To increase this width to 300 feet would require additional authorizing legislation by the Congress. *** The authority delegated to the Chief of Engineers by Congress to make necessary modifications of authorized projects does not extend to major increases in project scope, such as that which would be involved in widening the Tennesee-Tombigbee Waterway. App. 31a.

Later that year, in hearings before the Committee, the Chief of Engineers reiterated that the TTWW project could not be enlarged without prior Congressional authorization. Since 1951 it has been the consistent interpretation of the Corps of Engineers that it lacked the authority to make major modifications in authorized projects without prior Congressional authorization.

Following the 1951 hearings, no meaningful action was taken on the project until 1966, when the Corps completed an economic restudy which concluded that the project was best justified with a channel width of 300 feet and which recommended that such a project be approved. In March 1967, at the Corps' request, the Secretary of the Army signed a document approving the 300-foot channel for planning purposes. App. 39a. The existence of that document was disclosed for the first time in a 1976 Economic Reanalysis of the project.

Following this approval, the Secretary of the Army transmitted the 1966 restudy to Congress, but did not request legislation to authorize the 300-foot channel. To the contrary, he stated in his public transmittal letter that even

with such a channel "the Tennessee-Tombigbee navigation project continues to lack that margin of economic safety which typically marks federal investments in water resource development." See App. 40a.

The Congress took no action on the 1966 restudy. Indeed, both the district court and the Court of Appeals found that the Congress has never enacted legislation authorizing the channel expansion from 170 to 300 feet. The district court stated: "[N]o authorizing legislation was requested of or adopted by the Congress." App. 40a. The Court of Appeals stated: "The Congress did not then [1967] or later amend the statutory authorization for a 170-foot channel." App. 5a.

In 1971, the Corps published an environmental impact statement (EIS) which described the project as including a 300-foot channel, and the Congress appropriated initial construction funds. These were the first government actions concerning the project which were sufficiently final to make the project ripe for judicial review. The EIS was unsuccessfully challenged under the National Environmental Policy Act in *EDF v. Corps of Engineers,* 348 F.Supp. 916 (N.D. Miss. 1972), *aff'd* 492 F.2d 1123 (5th Cir. 1974). The petitioners did not raise the question of the authority of the Corps to construct the 300-foot channel in that litigation. Project construction began in 1972, and excavation of the 300-foot navigation channel began in 1974.

In 1974, a federal district court held for the first time that the Corps of Engineers lacked the authority to expand a major navigation project. *Atchison, Topeka and Santa Fe Railway v. Callaway,* 382 F.Supp. 610 (D.D.C. 1974). That decision had enormous implications for water resources law. Prior to *Atchison, Topeka,* the Corps had assumed that it could expand the size and scope of its water projects under the authority of existing statutes. App. 41a. This decision directly refuted that assumption,

and in conjunction with rising project costs, sparked an internal reassessment of the plan for the Tennessee-Tombigbee by the Corps in 1975. During that reassessment, the Corps became aware that there was an authority problem with respect to the 300-foot channel, for the reason that the Congress had never enacted substantive legislation authorizing the increase in channel width.

Despite this realization, the Corps in 1976 published a second economic reanalysis of the project which assumed the authority to construct the project with a 300-foot navigation channel. This reanalysis revealed for the first time that the 300-foot project would carry a massive amount of traffic at the expense of competing transportation modes and would create significant new environmental impacts both along the length of the project and for an additional two hundred miles south of the project to Mobile, Alabama, which had not been disclosed or analyzed.[1]

C. Proceedings Below

After reviewing the 1976 Economic Reanalysis and certain documents made public by the Corps of Engineers in 1975 that catalogued significant environmental damage to be expected from the project, the Environmental Defense Fund brought this action in the United States District Court for the District of Columbia on November 30, 1976.

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[1]The 1976 Economic Reanalysis unveiled a comprehensive scheme for the Tennessee-Tombigbee project which involved the construction of an "initial" project and an "ultimate" project. The former would cover the same geographical area as the authorized project. The latter would double the length of that project. The latest Corps estimate places the total cost of the "initial" project (north of Demopolis, Alabama) at $1.9 billion. The "ultimate" project, which would include the area between Demopolis and Mobile, Alabama, is estimated to cost over $3 billion.

In addition to a general challenge to the Corps' authority, the complaint also raised several challenges to the project on environmental and economic grounds.

On April 1, 1977, the action was transferred to the United States District Court for the Northern District of Mississippi. Petitioners National Audubon Society, Birmingham Audubon Society, and Alabama Conservancy intervened in the action on June 20, 1977.

In January 1978, following discovery of the Secretary of the Army's March 1967 memorandum, the petitioners filed an amended complaint for both declaratory and injunctive relief which more specifically delineated a challenge to the Corps' authority to construct the project with a 300-foot channel.

On November 28, 1978, the district court scheduled a hearing on the authority issues alone, and postponed consideration of the other issues in the complaint.

Following trial in January and February of 1979, the district court on March 12, 1979 entered an order and supporting opinion which expressly found that the Congress had never enacted legislation authorizing a 300-foot channel for the project, App. 40a, 68a, but concluded that the petitioners' authority claims should nevertheless be barred by the doctrine of laches. App. 60a-68a.

After their Petition for a Writ of Mandamus was denied, the petitioners took an expedited appeal to the United States Court of Appeals for the Fifth Circuit, which issued its opinion on March 24, 1980 affirming the district court. A timely Petition for Releasing was denied on April 22, 1980. App. 1a.

Although it agreed with the district court that the Congress had never authorized the 300-foot channel for the project, App. 5a, and although it conceded that "[i]t is dif-

ficult to say that a government agency can be prejudiced by forcing it to comply with the law," App. 13a, the Court of Appeals concluded that laches was appropriately invoked for two reasons: First, the court indicated that Congress had somehow authorized or ratified the 300-foot project through several passing references to the project environmental impact statement which occurred in the course of an appropriations debate, and through continued appropriations for the project. App. 13a-14a. Second, the court reasoned that the Corps had shown undue prejudice because it had spent over $176 million by the time the amended complaint was filed, a figure that represented roughly 11% of the total cost of actual project construction. App. 13a.[2] Finally, the Court reasoned that the Corps had also demonstrated prejudice because it would be forced to "narrow" that part of the channel that has already been constructed if the petitioners were to prevail. *Id.*

REASONS FOR GRANTING THE WRIT

SUMMARY: **This Case Presents An Important Issue Of Federal Law Concerning The Manner In Which Prejudice To a Government Agency Can Be Measured, And Conflicts With This Court's Decision In *TVA v. Hill.***

The courts below held that a government agency charged with protecting the public interest and prohibited from usurping the commerce power of the Congress will be unduly prejudiced if forced to seek Congressional authorization for a dramatic increase in the size of a public

[2]At the time the original complaint was filed in 1976, the Corps had spent on actual project construction roughly $93 million on actual project construction, which amounted to roughly 8% of the actual construction cost estimate then in use. As of September 1979, the Corps had spent roughly $600 million, which amounts to approximately 30% of the latest cost estimate for the "initial" project, and approximately 20% of the latest cost estimate for the "ultimate" project.

works navigation project that is under construction, but is far from complete. There is simply no precedent to support such a ruling. To the contrary, the ruling ignores governing law, and squarely conflicts with this Court's decision in *TVA v. Hill,* 437 U.S. 153 (1978).

Prior to the decision below, five separate Circuit Courts of Appeal had already addressed the issue of the proper method of analysis when examining the question whether a government agency will be unduly prejudiced by a given lawsuit. Each had reached a conclusion which is at odds with the decision below.

In *Arlington Coalition on Transportation v. Volpe,* 458 F.2d 1323 (4th Cir. 1972) and *Environmental Defense Fund v. Tennessee Valley Authority,* 468 F.2d 1164 (6th Cir. 1972) (McCree, J.), the Courts of Appeal for the Fourth and Sixth Circuits concluded that such agencies could not be unduly prejudiced so long as the project had not progressed to the point where they were no longer able to comply with their statutory duties with respect to those projects. The First, Second, and Fifth Circuit Courts of Appeal reached similar conclusions in *Jones v. Lynn,* 477 F.2d 885 (1st Cir. 1973), *Steubing v. Brinegar,* 511 F.2d 489 (2d Cir. 1975), and *Ecology Center of Louisiana v. Coleman,* 515 F.2d 860 (5th Cir. 1975). As in those cases, it is not too late for the Corps of Engineers to effectuate the statutory and constitutional duty at issue here: the duty to honor the plenary power of the Congress over commerce by obtaining prior authorization for any dramatic expansion of a navigation project.

Moreover, in *TVA v. Hill,* 437 U.S. 153 (1978) this Court made clear that the degree of project completion is irrelevant to the question whether an agency can be enjoined from proceeding in direct violation of express Congressional commands. *TVA v. Hill* also re-affirmed that Congressional appropriations do nothing to authorize or ap-

prove agency action. The decision below is squarely in conflict with *TVA v. Hill* on both these points.

I. The Decision Below Directly Conflicts With Decisions Of Other Courts Of Appeal By Applying Traditional Notions of Prejudice To A Public Agency That Is Acting Without Authorization.

The traditional laches concept of prejudice does not apply where the defendant is a government agency spending public money on an unauthorized project.

Prior to the decision below, five Circuit Courts of Appeals had addressed the question whether traditional notions of prejudice could be applied to government agencies for purposes of laches. Each had concluded that such agencies could not establish undue prejudice by mere reliance on construction progress or expenditure of money. Rather, the courts had uniformly concluded that the agency must also show that with respect to the project in question it was no longer capable of complying with relevant statutory commands. The decision below is in conflict with each of these cases.

In *Arlington Coalition on Transportation v. Volpe,* 458 F.2d 1323 (4th Cir. 1972), the Fourth Circuit found that the government defendants had already expended over $30 million on the challenged project, but expressly declined to invoke laches for the reason that the Congress had declared in the National Environmental Policy Act that environmental values must be protected. Since in the court's view the project had "not progressed to the point where the costs of altering or abandoning the proposed route would *certainly* outweigh the benefits that might accrue therefrom to the general public," the court required the

agency to suspend work and to comply with NEPA. 458 F.2d at 1329-1330.

In *Environmental Defense Fund v. Tennessee Valley Authority,* 468 F.2d 1164 (6th Cir. 1972), the Sixth Circuit, per Judge McCree, refused on two grounds to invoke laches to bar a challenge to TVA's construction of a dam across the Little Tennessee River, even though the agency had already spent $29 million out of a total estimated project cost of $69 million. *Id.* at 1170. First, the court stated that "[t]he strong policy embodied in the NEPA concerning the importance of agency consideration of environmental values militates against barring this suit on the ground of unreasonable delay . . ." *Id.* at 1182. Second, the court emphasized that "[t]*here is also the public interest in requiring public officials to obey statutory mandates." Id.* at 1183. (emphasis added).

In *Jones v. Lynn,* 477 F.2d 885 (1st Cir. 1973), the First Circuit agreed that the question of delay in bringing a NEPA action was not the central issue for laches purposes, since the agency had primary responsibility for complying with the Act. Therefore, the court refused to find that the agency would be prejudiced, even though nearly $12 million out of a $19 million project budget had been committed. *Id.* at 887-888, 892-893.

In *Steubing v. Brinegar,* 511 F.2d 489 (2d Cir. 1975) the Second Circuit also emphasized that when a government agency is a defendant, the question of prejudice is more critical than the question of delay. Noting that there the plaintiffs were "attempting to effect compliance by public officials with duties imposed by Congress under NEPA," the court concluded that the central question was "whether injunctive relief pending compliance would still serve the public interest and the purposes of the Act." 511 F.2d 489

(2d Cir. 1975). Thus, it declined to invoke laches even though several million dollars had been spent, on the ground that the environmental savings would outweigh any detriment to the defendants. *Id.* at 495-496.

Finally in *Ecology Center of Louisiana v. Coleman,* 515 F.2d 860 (5th Cir. 1975), the Fifth Circuit joined the other circuits in concluding that the traditional laches concept of prejudice to a private party cannot apply where the defendant is a government agency spending public money at the direction of Congress. There the court ruled that it was appropriate to examine Congressional directives that establish "a set of criteria which the agency should use to determine what its interests are." 515 F.2d. at 868. If the agency remains able to comply with the criteria established by those directives, it cannot assert undue prejudice from an order suspending project work pending such compliance. *Id.* Accordingly, the court declined to invoke laches, where project progress was minimal. *Id.* at 869.

In the face of this settled precedent, the decision below utterly failed to examine whether the Corps of Engineers remains capable of satisfying governing federal directives which apply to the Tennessee-Tombigbee project. In this case these directives are contained not only in various statutes such as 33 U.S.C. § 401, 701b-8 and 701-m, and 42 U.S.C. § 1962d-5, but also in the Commerce Clause of the Constitution.

These directives implement the fundamental doctrine of separation of powers by directing that the Congress retains power over navigation projects which affect interstate commerce, and by establishing that an executive agency such as the Corps cannot expand the size and capacity of such projects without prior Congressional authorization. The public interest in obedience to this fundamental principle is at least as strong as is the public interest in protec-

tion of the environment, and complements that interest in cases such as this, where violations of the commerce clause involve great environmental destruction. Government agencies should therefore not lightly be allowed to claim prejudice at the prospect of being asked to comply with these directives.

For example, 33 U.S.C. § 701m allows the Corps to *reduce* the size of a project, while 42 US.C. § 1962d-5 allows the Corps to construct projects costing *less* than $15 million, without prior legislative authorization. Under the settled maxim *expressio unius est exclusio alterius,* these statutes prohibit the Corps from expanding project size where the expanded project will cost more than $15 million. *See United States v. 2,606.84 Acres of Land in Tarrant County Texas,* 402 U.S. 916, 920 (1971) (Douglas, Black JJ., dissenting from denial of petition for certiorari);[3] *cf. Atchison, Topeka & Santa Fe. Ry. Co. v. Callaway,* 382 F.Supp. 610, 620 n.31 (D.D.C. 1974).

Moreover, the Commerce Clause plainly mandates that the Congress shall have plenary power over navigation projects. *Gibbons v. Ogden,* 22 U.S. 1 (1824). It is settled law that the Commerce Clause grants to the Congress alone the power to determine "the character and extent" of any improvements to navigation capacity. *United States v. Chicago M. St. P. & P.R.R.,* 312 U.S. 592, 596 (1941).

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[3]In *Tarrant County* the Corps was also charged with exceeding the scope of its authority in constructing a public works project. Justice Douglas and Justice Black stated that the specter of unbridled power vesting in the Chief of Engineers was of sufficient public importance to merit review by this Court. This case raises a similar issue in the context of a much larger project, and demonstrates graphically the tremendous impact of unfettered Corps' power to modify such projects. For example, the increase in channel width challenged here allowed the Corps to claim benefits for a project that would carry over 28 million tons of commerce in its initial year of operation, as compared to only 8 million tons prior to the increase. See App. 41a.

The court below simply failed to address these Constitutional and Congressional directives. It therefore reached two erroneous conclusions.

First, it concluded that the Corps had demonstrated undue prejudice by the mere expenditure of public money on a project that had never been authorized by the Congress. App. 13a-14a.

Second, it concluded that the Corps had demonstrated undue prejudice by alleging that it would be forced to expend additional public money to decrease the size of the project once the Congress had ruled on the authority question.

These conclusions violated the analysis adopted by five separate Courts of Appeal in the cases already discussed, and contravened the commerce clause. On the one hand, the first conclusion simply failed to engage in the analysis mandated by those cases. On the other hand, the second conclusion impermissibly preempted the right of the Congress to make the authority decision, then compounded that error by concluding that the decision would be adverse to the Corps in that a "narrowing" of the project would be required.

Moreover, the decision misapprehended the nature of the relief sought by the petitioners. The petitioners have never suggested that the Corps should be required to narrow the channel for the project. They have simply asked the courts to recognize that the Congress is the proper branch of government to make decisions concerning the dramatic expansion of navigation projects in interstate commerce, and to require the Corps to seek such a decision in this case. Following that proper exercise of the court's Article III power, it will be incumbent upon the Congress to decide whether the navigation capacity of the project

should be increased. Congress of course remains at liberty to fashion its decision in the manner it chooses.[4]

Thus the decision below violates the commerce clause and the separation of powers doctrine, and is unsound as a matter of public policy. The decision would encourage government agencies to avoid Congressional scrutiny of their projects and to spend public moneys as rapidly as possible in the hope that the expenditures would support a finding of undue prejudice and thereby insulate their actions from judicial review. Such a result is not supportable in either law or logic, and should be reviewed by this Court.

II. The Decision Below Contravenes *TVA v. Hill*

The decision below contravenes this Court's decision in *TVA v. Hill,* 437 U.S. 153 (1978) by allowing a federal agency to continue construction of an unauthorized navigation project in violation of the Commerce Clause and governing federal statutes on the ground that the Congress has appropriated money for that construction.

In *TVA v. Hill,* this Court concluded that the agency could not complete construction of a project that was virtually 100% finished because completion would violate the provisions of the Endangered Species Act, *Id.* at 172, 193-195. In reaching its decision, this Court expressly rejected the argument that continuing appropriations for the project could exempt the agency from compliance with the Act. *Id.* at 191-193. In concluding that the project must be enjoined, this Court stated:

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[4]For example, the project is now open to limited navigation for a portion of its length at the southern end. The Congress is free to decide that this portion of the project should remain operational even if it decided not to authorize further expansion of the project beyond the authorized width or length.

> Our system of government is, after all, a tripartite one, with each Branch having certain defined functions delegated to it by the Constitution. While "[it] is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison,* 5 U.S. 137, 177, 2 L.Ed. 60 (1803), it is equally — and emphatically — the exclusive province of the Congress not only to formulate legislative policies, mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.
>
> * * *
>
> We agree with the court of Appeals that in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action . . .
>
> *Id.* at 193-195.

In this case, under the settled principle of *expressio unius,* Congress has by statute indicated that the Corps is prohibited from making modifications to authorized projects which cost more than $15 million. See discussion at Part I. Even more fundamentally, the Framers of the Constitution and an unbroken line of authority have long since established that the Corps cannot arrogate to itself the power to make significant changes to the capacity of navigation projects without prior Congressional authorization. As discussed in Part I of this Petition it is settled law that the Commerce Clause grants to Congress alone the power to determine "the character and extent" of any improvements to navigation capacity. *United States v. Chicago M.St.P. & P.R.R.,* 312 U.S. 592, 596 (1941); *see, e.g., Gibbons v. Ogden,* 22 U.S. (9 Wheat)1(1824).

Given these facts, *TVA v. Hill* teaches that the Corps of Engineers must be prevented from constructing a 300-foot channel for the Tennessee-Tombigbee project in the absence of Congressional authorization, and in direct contravention of applicable statutes, as well as the Commerce Clause. Moreover, *TVA v. Hill* demonstrates that this injunction must issue regardless of the stage of project completion, and despite a history of Congressional appropriations for the project.

Equally important, the decision below should be reversed under *TVA v. Hill* because the Court of Appeals refused to carry out its Article III duty to enforce the law. This refusal violated the separation of powers doctrine by sanctioning an unlawful usurpation of the legislative prerogative over interstate commerce by the executive branch. In *TVA v. Hill* terms, this failure to act in effect pre-empted the interstate commerce power of Congress which is embodied in the constitution and the statutes. Under *TVA v. Hill,* therefore, the decision below cannot stand.

Consideration by this Court is important for a final reason. The Corps of Engineers is involved in numerous navigation and construction projects throughout the country. The annual budget of the Corps now exceeds $3 billion. Even a slight expansion in the scope of these projects would cost millions of dollars and would consume significantly greater portions of the nation's natural resources, in addition to causing significantly greater environmental damage.

Moreover, the expansion of the scope of navigation projects vitally affects a large segment of the nation's economy and environment. For this reason alone, such a decision is supremely legislative in character. The Framers wisely resposed such decisions in Congress under the Com-

merce Clause of the Constitution. As a matter of sound public policy, decisions such as this simply cannot be left to the Corps; they must remain with the Congress. The opinion below failed to address this fundamental separation of powers issue, and therefore should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

JON T. BROWN
STEPHEN E. ROADY
Brown & Roady
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Counsel for Petitioners

JAMES T. B. TRIPP
475 Park Avenue, South
New York, New York 10016
Counsel for Petitioner
Environmental Defense Fund

APPENDIX A

[Received Apr 24, 1980]

UNITED STATES COURT OF APPEALS

GILBERT F. GANUCHEAU
CLERK

FIFTH CIRCUIT
OFFICE OF THE CLERK

TEL 504-589-6514
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April 22, 1980

TO ALL PARTIES LISTED BELOW:

NO. 79-2684 ENVIRONMENTAL DEFENSE FUND, INC., ET.AL., – vs – CLIFFORD R. ALEXANDER, Etc., ET.AL., (EC-77-0053-K & EC-77-0054-K)

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
GILBERT F. GANUCHEAU, Clerk
By /s/ P Keller
Deputy Clerk

cc: Mr. Jon T. Brown
Mr. Stephen E. Roady
Mr. James T.B. Tripp
Mr. Glenn Whitaker
Mr. Ralph E. Pogue
Mr. Hunter M. Gholson
Mr. William T. Stephens
Mr. H.M. Ray,
Mr. David Webb

APPENDIX B

ENVIRONMENTAL DEFENSE FUND, INC., Committee for Leaving the Environment of America Natural, Glenn H. Clemmer, G. Randall Grace, and F. Glenn Liming, Plaintiffs-Appellants,

v.

Clifford R. ALEXANDER, Secretary, Dept. of the Army, the United States Army Corps of Engineers, Dept. of the Army, and Major General John Morris, Chief of Engineers, Dept. of the Army, Defendants-Appellees,

Tombigbee River Valley Water Management District, Tennessee-Tombigbee Waterway Development Authority, State of Alabama and Tombigbee Valley Development Authority, Intervening Defendants-Appellees.

LOUISVILLE AND NASHVILLE RAILROAD, Plantiff-Appellant,

v.

Clifford R. ALEXANDER, Secretary, Dept. of the Army, the United States Army Corps of Engineers, Dept. of the Army, and Major General John Morris, Chief of Engineers, Dept. of the Army, Defendants-Appellees,

Tombigbee River Valley Water Management District, Tennessee-Tombigbee Waterway Development Authority, State of Alabama, and Tombigbee Valley Development Authority, Intervening Defendants-Appellees.

No. 79-2684.

United States Court of Appeals,
Fifth Circuit.

March 24, 1980.

Jon T. Brown, Stephen E. Roady, Washington, D.C., James T.B. Tripp, New York City, for plaintiffs-appellants.

Glenn Whitaker, U.S. Dept. of Justice, Washington, D.C., for Alexander and Morris.

Pogue & Pace, Ralph E. Pogue, Aberdeen, Miss., for Water Management Dist.

Hunter M. Gholson, Columbus, Miss., for Waterway Development Authority.

William T. Stephens, Asst. Atty. Gen., Montgomery, Ala., for State of Ala.

H.M. Ray, U.S. Atty., Oxford, Miss., for the U.S.

David Webb, Mobile Dist., Mobile, Ala., for U.S. Army Corps of Engineers.

Appeal from the United States District Court for the Northern District of Mississippi.

Before GEWIN, RUBIN and SAM D. JOHNSON, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

This attempt to halt the construction of a federally financed waterway because of the width of the waterway exceeds the size authorized by Congress was dismissed by the district court on the basis that it was barred by laches — delay in presenting the claim resulting in prejudice to the defendants. We hold that laches was an appropriate defense, that the factual findings on which the district judge based his conclusions were supported by the record and that the legal principles he applied were correct.

I.

The headwater of this litigation commenced to flow forty years ago when the Army Corps of Engineers presented Congress with a preliminary design for the proposed Tennessee-Tombigbee Waterway. The design was reviewed and modified in a report submitted to Congress in 1946. In that year Congress authorized construction of the waterway in accordance with the plans presented to it. Act of July 24, 1946, Pub.L.No. 79-525, 60 Stat. 634. The plans described a waterway that would provide a navigation channel not less than nine feet in depth with a minimum bottom width of 170 feet (called a 170-foot channel), thus permitting two-way barge traffic.

Shortly after authorizing construction, Congress decided that the waterway was not economically feasible, and for some time it did not appropriate any funds for construction. However, studies continued. In June, 1966, in response to a request by Congress for restudy of the economic desirability of the project, the Corps of Engineers recommended that the proposed plan be modified to provide for a 300-foot channel (for convenience we refer to this as the 300-foot channel although this is its minimum width at its bottom). A channel of this size would accommodate larger tows and be better suited to changed economic conditions. On November 3, 1966, the Chief of Engineers issued an announcement notifying the public that the restudy of the waterway had been completed, and that it had been determined that the project was better justified economically with a 300-foot channel. Interested parties were invited to present their views and comments concerning the report within thirty days.

The restudy report was submitted on March 20, 1967, to the Secretary of the Army with the recommendation that

he exercise what the Corps considered his discretionary authority under the authorizing statute to increase the project width to 300 feet, and allow further planning to proceed on that basis. Ten days later the Secretary accepted and acted on this recommendation. He forwarded a copy of the restudy report to the House and Senate Public Works and Appropriations Committees along with a copy of his memorandum reflecting the increase in the project width. Congress did not then or later amend the statutory authorization for a 170-foot channel.

On May 18, 1967, the Association of American Railroads, on behalf of the L&N Railroad Company and other railroad companies in the waterway area, submitted a report to the Senate Appropriations Committee specifically suggesting the need for a reevaluation of the project authorization because of the increase in the project's width from 170 feet to 300 feet. *See Public Works for Water and Power Resources Development and Atomic Energy Commission Appropriations for Fiscal Year 1969: Hearings on H.R. 17903 Before the Subcomm. of the Senate Comm. on Appropriations,* 90th Cong., 2d Sess. 2050, 2054 (1968) (Statement of Tennessee-Tombigbee Waterway Project Committee, Association of American Railroads). Subsequently, the Appropriations Committees recommended appropriation (in fiscal year 1971) of construction funds for the waterway with the increased bottom width. During the budget hearings for fiscal year 1971, representatives of appellants L&N Railroad and Committee for Leaving the Environment of America Natural (CLEAN) appeared before the House and Senate Appropriations Committees to oppose funding of the waterway.[1]

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[1]See *Public Works for Water, Pollution Control, and Power Development and Atomic Energy Commission Appropriation Bill, 1971; Hearing Before the Subcomm. of the House Comm. on Ap-*

Congress appropriated construction funds of $1 million for fiscal year 1971 and $6 million for fiscal year 1972. *See Environmental Defense Fund, Inc., v. Corps of Engineers of the United States Army,* 348 F.Supp. 916, 924 (N.D. Miss.1972), *aff'd,* 492 F.2d 1123 (5th Cir. 1974). CLEAN and the Environmental Defense Fund (EDF) filed suit to enjoin the construction of the waterway in 1971. It was stipulated in that suit that the authorized width of the waterway was 300 feet. *See id.* at 920. Actual construction of the waterway began in 1972. Ultimately, the 1971 suit was dismissed by the court, and construction proceeded.

In November, 1976, this suit was filed, again seeking to enjoin construction. Plaintiffs alleged that the project under construction differed substantially from the project authorized by Congress and would have a greater impact on the environment and economic conditions of the surrounding areas, violating both statutory limitations and administrative regulations. However, the increase in the width of the channel was neither mentioned nor challenged. Over a year later, on January 30, 1978, an amended complaint was filed questioning, for the first time, the authority of the Corps to build a 300-foot channel.

When this suit was filed, the Corps had spent $36,000,000 out of a total estimated cost of $604,000,000 for channels and canals. By January 30, 1978, when the amended complaint was filed, it estimates it had completed 18% of the total project and spent over $265,-000,000. After filing the lack of authority claims, the plaintiffs made no effort to obtain immediate injunctive

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propriations, 91st Cong., 2d Sess. 391, 397 (1970); *Public Works for Water, Pollution Control, and Power Development and Atomic Energy Commission Appropriations for Fiscal year 1971: Hearings on H.R. 18127 Before the Subcomm. of the Senate Comm. on Appropriations,* 91st Cong., 2d Sess. 467 (1970).

relief and thus halt the further expenditure of funds or work on the project.

The Corps is now obligated on outstanding construction contracts in the amount of $864,302,200. If the project is restricted to a 170-foot channel, some of these funds may be recouped by sale of the unnecessary right of way and by renegotiation of contracts. Those who question authority to proceed urge that a substantial part of the $864 million could be saved if the project were restricted to 170 feet. In response to inquiry by this court concerning amounts spent for construction, the Corps estimates that by September 30, 1978, $408,651,600 had been spent for construction and $616,007,156 has been spent to the present. The opponents of the waterway state that the following sums have been spent on actual project construction:

As of September 30, 1976: $93,314,300.

As of September 30, 1977: $176,324,100.

As of September 30, 1978: $286,862,900.

This is in addition to those costs incurred for purposes other than construction.[2]

The district judge did not decide whether the Secretary was authorized to increase the width of the channel because he concluded that the challenge was barred by laches. Deciding only that issue, he directed entry of a final judgment pursuant to rule 54(b) of the Federal Rules of Civil Procedure, making an express determination that

[2]Focusing on "construction costs," the waterway opponents assert that money spent for historical and archeological surveys was not a part of construction costs, and that amounts spent for engineering and design and supervision and administration should not be counted toward money spent on construction because some of the design could be used if there were a 170-foot rather than a 300-foot project. However, at least some of these expenditures could not be recovered.

there was no just reason for delay and an express direction for the entry of judgment. That order is appealable. *See Bailey v. McCann,* 550 F.2d 1016 (5th Cir. 1977); *B.B. Adams General Contractors, Inc. v. HUD,* 501 F.2d 176 (5th Cir. 1974). After discussing the general principles applicable, we will consider separately each of the grounds on which it is urged that we should reverse.

II.

[1] Mindful that we do not sit to decree what accords with "common sense and the public weal" and that the constitutional separation of governmental powers forbids the Secretary or this court to preempt congressional action, *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 196, 98 S.Ct. 2279, 2302, 57 L.Ed.2d 117, 147 (1978), we review the applicability of the doctrine of laches. What is sought here is an injunction, an equitable form of relief. The doctrine of laches was developed by chancellors of equity to prevent the assertion of stale claims and to remedy an injustice that sometimes arose from the existence of the separate system of equity: when an equitable remedy was sought, the statute of limitations that ordinarily would apply to a legal right was inapplicable.

[2] The doctrine was eventually adopted by common law courts and, following the merger of law and equity, became part of the general body of rules governing relief in the federal court system. Its interpretation in equity courts was not uniform; at times the courts required a showing of prejudice to the defendants, at other times the chancellor applied it if a plaintiff had unreasonably delayed the assertion of his claim whether or not the defendant had been prejudiced. One basic principle has, however, been consistently followed: equitable remedies are not available if granting the remedy would be ine-

quitable to the defendant because of the plaintiff's long delay.

[3] Today, three independent criteria must be met before laches can be invoked to bar litigation. "The defendant must show: (1) a delay in asserting a right or claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim is asserted." *Save Our Wetlands, Inc. (SOWL) v. United States Army Corps of Engineers,* 549 F.2d 1021, 1026 (5th Cir.), *cert. denied,* 434 U.S. 836, 98 S.Ct. 126, 54 L.Ed.2d 98 (1977); *accord, Gardner v. Panama R. Co.,* 342 U.S. 29, 72 S.Ct. 12, 96 L.Ed. 31 (1951); *Law v. Royal Palm Beach Colony, Inc.,* 578 F.2d 98 (5th Cir. 1978); *Van Bourg v. Nitze,* 128 U.S.App.D.C. 301, 388 F.2d 557 (D.C. Cir. 1967). Whether laches bars an action in a given case depends upon the circumstances of that case and is "a question primarily addressed to the discretion of the trial court." *Gardner v. Panama R. Co.,* 342 U.S. 29, 30, 72 S.Ct. 12, 13, 96 L.Ed. 31, 32 (1951).

[4] As we have recently said, the applicability of the doctrine of laches to environmental litigation is no longer open to doubt. *See Save Our Wetlands, Inc. (SOWL), v. United States Army Corps of Engineers,* 549 F.2d 1021, 1026 (5th Cir.), *cert. denied,* 434 U.S. 836, 98 S.Ct. 126, 54 L.Ed.2d 98 (1977), and cases cited therein. It is equally applicable to suits questioning public authority to act. *Ecology Center of Louisiana, Inc. v. Coleman,* 515 F.2d 860 (5th Cir. 1975); *Clark v. Volpe,* 342 F.Supp. 1324 (E.D.La.), *aff'd,* 461 F.2d 1266 (5th Cir. 1972).

The record, which we have already summarized, amply supports the district judge's finding that on November 3, 1966, about a decade before the suit was filed, the Corps gave public notice of its recommendation to expand the

width of the canal together with an invitation to the public to submit written comments. Shortly thereafter, the Secretary decided to increase the width. While there is no mention in the legislative history from 1967 to 1976 of the Secretary's explicit invocation of his discretionary authority to widen the waterway, it is evident in the Committee reports and other congressional documents issued in this period that Congress had been informed of the change in plans to make the channel wider. In 1967 the Secretary sent his report to Congress with the recommended changes; both the legislative history and the 1971 Environmental Impact Statement note that the channel is 300 feet.

[5] There is also ample evidence that the waterway opponents who appear in this suit were aware of this change: the 1967 opposition to a 300-foot channel by the Association of American Railroads, in part on L&N RR's behalf; the opposition to funding of the 300-foot channel project by CLEAN and EDF in Congress; and the suit to halt construction in 1971. The present waterway opponents did not challenge that decision until 1978, eleven years later. Even if we assume the challenge to have been effective when the complaint was filed in 1976,[3] the delay was nine years.

[3]We think the district judge properly measured injury at the time the challenge to the channel width was made, January 30, 1978, and not at the time the original complaint was filed. Our discussion of prejudice, therefore, will focus on the date this amended complaint was filed. In some circumstances application of a statute of limitations may depend upon when suit was filed and not when a particular claim is made, for the claim may relate back to the original complaint. *See* Fed.R.Civ.P. 15(c); *Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574, 65 S.Ct. 421, 89 L.Ed. 465 (1945). However, laches rests on policy concerns different from those of statutes of limitations. The challenge to the channel width is fundamental and strikes at the heart of the project. It was appropriate to appraise injury to defendants at the time plaintiffs actually asserted the claim, rather than at the time at which they began to raise other challenges to the project.

If we accept the contention that appellants remained blissfully ignorant of the increased dimensions throughout the congressional hearings on the waterway and despite the public attention the project received, they were aware of the width increase no later than 1971, when they sought to enjoin construction and stipulated to that width. This suit was not filed until five years thereafter, and the issue of authority to make the width increase was not injected until two years later.

[6-9] Mere neglect to challenge action is not sufficient to establish laches in any case. When government action is involved, members of the public are entitled to assume that public officials will act in accordance with law. *Save Our Wetlands, Inc. (SOWL), v. United States Army Corps of Engineers,* 549 F.2d 1021, 1027-28 (5th Cir.), *cert. denied,* 434 U.S. 836, 98 S.Ct. 126, 54 L.Ed.2d 98 (1977). Therefore, apart from the question of prejudice, which we will discuss later, the government must show that those whom it seeks to bar by invoking laches were or should have been aware of the questionable nature of the governmental activity. The waterway opponents in this case had an adequate indication that the Secretary of the Army had unilaterally expanded the width of the canal beyond its statutorily authorized channel width. This was enough to alert them to the claim that the authorities were not acting legally.

The appellants urge that it was only in 1976, when the Corps released its reanalysis of the TTW project, that they were aware of a problem in the authorization of the increased channel width and the economic and environmental consequences of that increase. The district judge was entirely justified in concluding that this was not a credible excuse. The waterway opponents' long interest in this project and their activities in opposition to it have already been reviewed. We do not find the trial judge erroneous

because he lacked credulity in the contention that the plaintiffs were not aware of the threat posed to their interests by a 300-foot waterway until 1976.

[10] Their claim in effect is reduced to the assertion they did not realize it was illegal for the Army to do what it had done. However, laches does not depend on subjective awareness of the legal basis on which a claim can be made. Moreover, although it is impossible for any person to know what is in another's mind, the record contains ample evidence that the problem should have been known; the authorization problem had occurred to others and was evident from the Army Corps of Engineers' discussions of the project and their regulations.

[11] Because there is no evidence of any excuse for the lengthy delay, we next consider the final prerequisite to laches: prejudice. Measuring prejudice entails balancing equities. Under the rule as applied in *Save Our Wetlands, Inc. (SOWL) v. United States Army Corps of Engineers,* 549 F.2d 1021 (5th Cir), *cert. denied,* 434 U.S. 836, 98 S.Ct. 126, 54 L.Ed.2d 98 (1977), we are required to consider the expenditures made by the defendants against the benefits claimed if their efforts were halted. Environmental concerns are not presented to us; therefore, unlike the situation in *Ecology Center of Louisiana, Inc. v. Coleman,* 515 F.2d 860 (5th Cir. 1975), detriment to the environment cannot be a factor in our balance; the benefits we must weigh that could accrue by arresting work can be only those arising from the claimed vindication of congressional authority.

The amounts expended may be large in absolute terms but this does not tilt the scales if it represents a relatively small percentage of the total expenditures anticipated. *See, e.g., Ecology Center of Louisiana, Inc. v. Coleman,*

515 F.2d 860 (5th Cir. 1975) ($1 million had been spent out of a total estimated cost of $667 million). Here by the most conservative estimates, between $176 million and $286 million had been spent before the no-authority claim was asserted. This represented about 11% of the total project cost,[4] far more than the 1/6 of 1% expended in *Coleman*. Vast amounts of soil had been excavated, locks had been built, and local authorities had constructed bridges. Reshaping the project would not only entail waste of much of those expenditures but also the outlay of additional funds to narrow the channel; moreover, there is substantial evidence that the narrower channel would be economically impractical and would never have been constructed.

It is difficult to say that a government agency can be prejudiced by forcing it to comply with the law. The citizenry are prejudiced by the improper outlay of public funds and it is they who suffer if governmental authorities violate the law. However, there is public interest in the prompt presentation of even the most valid objections to public projects from another point of view: those who oppose the unauthorized expenditure of public funds should act timely in order to prevent the utter waste that results if what is done must be undone.

Whether or not Congress authorized widening the channel, it has considered environmental impact statements on the project and determined to go ahead. *Environmental Defense Fund, Inc. v. Corps of Engineers of the United*

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[4]This is, of course, a very rough estimate, taking into account the uncertainty, based on appellants' figures, of exactly how much had been spent at the time the amended complaint was filed, and taking the most recent estimate for initial total project cost available. ($1,925,000,000) The figure is probably conservative; the government estimates it at 18%.

States Army, 492 F.2d 1123 (5th Cir. 1974). It has continued to appropriate money for the project. Although the public interest and prejudice to that interest cannot always be determined by a kind of economic weighing of how much has been spent, it is a fact that over $176 million had been spent at the time the amended complaint was filed and that much of the waterway has been built. The Corps has shown ample prejudice here both in the wasting expenditure that has occurred and the additional expense of narrowing what has already been built.

It is tendentious to assert that the district court has a duty to decide the case on the merits and not to consider the defense of laches. The court surely has a duty to decide all cases and controversies within its jurisdiction, but we know of no duty to resolve the case on a particular basis. While the defense of laches is, as we have already pointed out, directed to the remedy, the decision of the case on that basis need not turn upon or follow a decision on the merits.

[12] The defense is not restricted to cases in which only private law claims are asserted; it is also applicable to complaints based on constitutional claims and those based on alleged violation of separation of powers. The doctrine bars us from granting an equitable remedy sought by plaintiffs. If the defense is established, the court's musings about how the case might have been decided on the merits if timely filed and if we could grant relief would surely be the rendering of an advisory opinion in violation of the constitutional stricture. *See* U.S. Const. art. 3, § 2; *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 240-41, 57 S.Ct. 461, 464, 81 L.Ed. 617, 621 (1937).

[13] The argument that the district court denied plaintiffs due process by giving assurances that laches was not

an issue lacks any foundation in the record and is indeed belied by it. Buttressed only by factual affidavits filed in this court for the first time, in disregard of our function as an appellate court, one of plaintiff's counsel asserts that he spoke to one of the judge's law clerks who told counsel that the judge did not plan to take evidence on any issue but the authorization for the project at the hearing and that all other issues including affirmative defenses would be heard later. We repeat the argument in order to give it express condemnation: courts speak to litigants by orders or minute entries or judgments or, on occasion, at conference in chambers. Ex parte communications with judges are generally disfavored. Code of Judicial Conduct for United States Judges, Canon 3 A(4). A fortiori, neither ex parte communication with a judge's clerks nor reliance upon such communication can be condoned.

[14] Moreover, the record does not support the notion of reliance on this communication: prior to the hearing, both the United States and the plaintiffs filed briefs addressing the issue of laches in relation to the authorization question, and, in his opening statement, counsel for the United States urged the issue on the court. Plaintiffs' counsel expressed no objection either to the statement or to the evidence introduced. Neither did counsel urge to the court that fair notice of the issue had not been given; in fact, plaintiffs' counsel recommended a conclusion of law on the laches issue favorable to their position. The contention is, therefore, completely without merit.

Laches is a clement doctrine. It assures that old grievances will some day be laid to rest, that litigation will be decided on the basis of evidence that remains reasonably accessible and that those against whom claims are presented will not be unduly prejudiced by delay in asser-

ting them. Inevitably it means that some potentially meritorious demands will not be entertained. But there is justice too in an end to conflict and in the quiet of peace. The district court concluded that the day for battle on the authorization issue had come and gone and that the question should now be laid to rest unheard. Finding his factual premises supported by the record and his conclusions of law correct, we AFFIRM his judgment.

APPENDIX C

ENVIRONMENTAL DEFENSE FUND, INC., Committee for Leaving the Environment of America Natural, Glenn H. Clemmer, G. Randall Grace, and F. Glenn Liming, Plaintiffs,

National Audubon Society, Birmingham-Audubon Society, and the Alabama Conservancy, Intervening Plaintiffs.

v.

Clifford R. ALEXANDER, the United States Army Corps of Engineers, and Major General John Morris, Defendants,

Tombigbee River Valley Water Management District, Tennessee-Tombigbee Waterway Development Authority, State of Alabama and Tombigbee Valley Development Authority, Intervening Defendants.

LOUISVILLE AND NASHVILLE RAILROAD, Plaintiff,

National Audubon Society, Birmingham Audubon Society, and the Alabama Conservancy, Intervening Plaintiffs,

v.

Clifford R. ALEXANDER, the United States Army Corps of Engineers, and Major General John Morris, Defendants,

Tombigbee River Valley Water Management District, Tennessee-Tombigbee Waterway Development Authority, State of Alabama, and Tombigbee Valley Development Authority, Intervening Defendants.

Nos. EC 77-53, 77-54-K.
United States District Court,
N.D. Mississippi, E.D.

March 12, 1979.

* * * * *

H.M. Ray, U.S. Atty., Oxford, Miss., Hunter M. Gholson, Columbus, Miss., for Tennessee-Tombigbee Waterway Development Authority.

Ralph Pogue, Aberdeen, Miss., for Tombigbee River Valley Water Management Dist.

Jerry L. Weidler, Asst. Atty. Gen., Montgomery, Ala., for State of Alabama.

Jon T. Brown, Stephen E. Roady, Duncan, Brown, Weinberg & Palmer, Washington, D.C., William A. Butler, Environmental Defense Fund, Washington, D.C., James T.B. Tripp, Environmental Defense Fund, New York City, Joseph V. Karaganis, Chicago, Ill, for Environmental Defense Fund, Inc.

William Robertson, U.S. Army Corps of Engineers, Atlanta, Ga., Ken Powers, Dept. of the Army Corps of Engineers, DAENCCK, Washington, D.C., David H. Webb, Asst. Dist. Counsel, Mobile Dist., Army Corps of Engineers, Mobile, Ala., for Army Corps of Engineers.

Barbara A. Babcock, Dept. of Justice, Glenn V. Whitaker, Edward Christenbury, Lewis K. Wise and Lawrence Moloney, Civil Division, Dept. of Justice, Washington, D.C., for Dept. of Justice.

Joseph L. Lenihan, Louisville, Ky., for Louisville & N.R.

MEMORANDUM OF DECISION

KEADY, Chief Judge.

In 1971 a group of environmentalists challenged the validity of the Tennessee-Tombigbee Waterway (TTW), a navigational project in Alabama and Mississippi which Congress authorized in 1946. The original complaint, asserting six causes of action for alleged violation of various statutes, was dismissed with prejudice by the district court.

EDF v. Corps of Engineers, 348 F.Supp. 916 (N.D.Miss.1972). The Fifth Circuit on appeal affirmed, 492 F.2d 1123 (1974), and certiorari was not sought.

Now , six years later and after the project is estimated to be about 29% complete and Congress has appropriated almost $600,000,000 toward the construction of the waterway, the project has again been challenged in a broad-scale attack by a coalition of environmentalists and a railroad. Some plaintiffs in the present action were parties in the prior litigation, i.e., Environmental Defense Fund, Inc. (EDF), the Committee for Leaving the Environment of America Natural (CLEANrict nd a plaintiff class of individuals aggrieved or detrimentally affected by TTW. Those parties are now joined as plaintiffs by Louisville & Nashville Railroad (L&N) and three plaintiff-intervenors, National Audubon Society, Birmingham Audubon Society and the Alabama Conservancy. The principal defendants, as before, are the Secretary of the Army, the Chief of Engineers, and the United States Corps of Engineers (Corps), and parties who have intervened as defendants are Tombigbee River Water Management District, Tennessee-Tombigbee Waterway Development Authority, State of Alabama and Tombigbee Valley Development Authority.[1]

By this present complaint, plaintiffs assert fifteen causes of action which may be reduced to three primary areas of judicial concern:

1. Plaintiffs contend in Counts I and II that the Corps lacks legal authority to construct the TTW, as it is doing,

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[1]Unless the context requires otherwise, reference to plaintiffs will encompass all parties plaintiff, including plaintiff-intervenors, and reference to defendants will include all parties defendant, including defendant-intervenors.

with a 300' wide navigational channel and other structures requiring major changes in design.

2. In Counts III and V, plaintiffs challenge the Corps' method of calculating costs and benefits as legal justification for continuance of the project by including therein benefits to be derived from major changes in channel width, cut offs and new lock structures of the Warrior-Tombigbee Waterway, a separate project whose improvement has not received congressional authorization. This established navigation project extends from the Port of Birmingham on the Warrior River (known as Black Warrior River from its source to Tuscaloosa and from Tuscaloosa to Demopolis known as Warrior River) (BWT), where it joins the Tombigbee and continues south to the Port of Mobile.

3. The plaintiffs challenge again the Corps' compliance with various environmental statutes, principally the National Environment Policy Act (NEPA), 42 U.S.C. § 4321, et seq., and the Fish and Wildlife Coordination Act, 16 U.S.C. § 661, et seq.[2]

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[2]Other causes of action are as follows:

Count IV charges noncompliance with the Water Resources Development Act of 1974, 42 U.S.C. § 1962d-17 by the Corps' use of an interest rate of 3¼% in its calculations of costs and benefits rather than 6⅛% currently required under regulations promulgated by the Water Resources Council.

Count VI charges violation of 33 U.S.C. § 701-1 by constructing the TTW with full knowledge that the project does not possess a positive benefit/cost ratio.

Count VII charges the Corps with violating its own regulations as well as NEPA, §§ 122 and 209 of the River and Harbor Act of 1970, and the principles and standards of the Water Resources Council by making a secret 1975 study in which alternatives were not disclosed to Congress or the public, and by adopting a 300′ wide channel for the TTW.

Count VIII charges that the Corps assumed the authorized existence of a 300′ channel in the BWT south of Demopolis, and upon discovery

By their answers, the defendants deny all violations of law and assert that the TTW is being constructed in accordance with law and the Corps' regulations. In addition, defendants plead res judicata, collateral estoppel and laches in bar of the various causes of action now raised by plaintiffs.

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that such was not authorized by Congress, the Corps arbitrarily segmented into two parts a project from Pickwick Pool in the Tennessee River to Demopolis with a 300′ wide channel and with plans to later secure authorization for the BWT channel south of Demopolis, duplicate locks, in order to sustain their prior calculation of a positive benefit/cost ratio.

Count IX charges that the Corps secretly prepared and filed General Design Memorandum (GDM) of components of the project without preparing or circulating Environmental Impact Statements (EIS) and without detailed disclosure and participation required by NEPA and the Corps' regulations.

Count X charges that the Corps, after identifying numerous adverse environmental and economic impacts, has failed to prepare and distribute a supplemental EIS as required by NEPA and § 122 of the River and Harbor Act of 1970.

Count XI complains that the Corps makes annual requests for congressional appropriations without the preparation of accompanying EIS.

Count XII charges the Corps with violating the Clean Water Act of 1977 by failure to file a detailed EIS with Congress prior to the discharge of dredged spoil in contravention of the regulations of the Environmental Protection Agency (EPA) governing dredging activities.

Count XIII charges that the project violates the requirements of the Fish and Wildlife Coordination Act, 16 U.S.C. § 662.

Count XIV charges that the Corps has failed to publish governing documents in the Federal Register, thereby violating the Administrative Procedure Act, 5 U.S.C.§ 552(a).

Count XV invokes § 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706, to hold the Corps' actions as arbitrary, capricious and otherwise not in accordance with law and in excess of statutory authority.

After extensive discovery, defendants moved for judgment on the pleadings or, in the alternative, for summary judgment on the principal issues raised by the complaint. Plaintiffs submitted a cross-motion for summary judgment directed, basically, to the authorization, economic and environmental questions. Each motion for summary judgment was accompanied by copious affidavits, depositions and other evidentiary materials which, in our judgment render the case, which is admittedly of a complex nature, incapable of summary disposition.

Therefore, the court calendared for full evidentiary hearing a basic claim raised for the first time in this litigation, not within the scope of the original complaint and hence not adjudicated in the prior action; namely the legality of TTW as constructed by the Corps since 1971 because the Corps is allegedly exceeding the physical dimensions of the legally authorized project and making other design changes in excess of authority. Indeed, in the initial litigation plaintiffs stipulated that the authorized bottom width for the project was 300′ except in the actual divide cut, where the authorized width was 280′. Neither did the plaintiffs challenge that the plan provided for lock chamber dimensions of 110 X 600′ and that authorized depths were 9′ in the river section and 12′ in the canal and divide sections. It is upon these physical aspects of the waterway, together with the substitution of a chain of lakes concept for a perched canal in the canal section, that plaintiffs mount their main attack upon the sufficiency of congressional authorization for the waterway. Although plaintiffs in the former case raised no issue as to what were the legally authorized dimensions of the TTW, nevertheless, the question is of basic importance, transcending all others which plaintiffs now assert. If TTW, as it is being constructed, is not a legally authorized project, all

other issues are mooted until such time as proper authorization may be obtained from Congress. The authority of the Corps, therefore, to construct the TTW in accordance with the present, ongoing plan is fundamental to a proper determination of the case.

I.

(a) *Nature of the TTW Project.*

After previous adverse reports, the original survey of the TTW is found in House Document 269, 76th Cong., 1st Sess., where the Chief of Engineers, on February 27, 1939, reported to Congress for the Rivers and Harbors Board of Engineers, recommending

> that the United States undertake the construction of a waterway to connect the Tennessee and Tombigbee Rivers, by way of the East Fork of the Tombigbee River, Mackeys Creek, and Yellow Creek, so as to provide a channel of not less than 9 feet in depth and a minimum bottom width of 170 feet in river and canal sections and 115 feet in the divide cut, with locks approximately 75 by 450 feet clear inside dimensions, substantially in accordance with the general plan presented in the report.

House Document 269 is a detailed analysis of the then existing navigation projects affecting the TTW and of the present and prospective commerce derived from navigation on the TTW.[3] It reported that the "improvement

[3]A House Document in waterway projects generally encompasses the recommendations of Corps officials with respect to a specific project and is, by reference, incorporated into the authorizing legislation. See *United States v. 2606.84 Acres of Land In Tarrant County, Texas*, 432 F.2d 1286 (5 Cir. 1970).

desired is a navigable waterway of dimensions which would permit modern barge-line operation between the Tennessee and Tombigbee Rivers." H.Doc. 269, ¶ 20, p. 16. It was recommended that the plan be divided into three parts, namely: the river section 180 miles in length, the canal section 41 miles in length, and the summit or divide cut 30 miles in length, with the dimensions of the channel width, depth and locks to be as above stated. Id. ¶ 30, p. 18. These dimensions were recommended since the 75 by 450′ lock could take care of an "economic standard tow [consisting] of five 35 by 145 foot barges and a towboat," and the "channels would be adequate to provide for double lane navigation for the standard tow, assuming 8-foot draft." Id. ¶ 32, 33, p. 19; see also ¶ 113, 114 and 115, p. 68.

The foregoing recommendations were approved by Congress, with modifications, by House Document 486, 79th Cong., 2nd Sess., adopted January 2, 1945. In view of the growth of the bargeborne traffic during intervening years, that document led the Board of Engineers for Rivers and Harbors to conclude that maximum economy for the proposed waterway can be attained by the provision of channels and locks with somewhat larger dimensions than have hitherto been recommended for a project connecting the Tombigbee and Tennessee Rivers. The Board's reexamination of prospective navigation requirements has occasioned fundamental revisions in the design of structures contemplated within the general plan of improvement. (H. Doc. 486, ¶ 2, p. 2).

The movement of waterway traffic from Mobile to Paducah over the Tombigbee-Tennessee waterway is obviously one for which no actual carrier costs can be obtain-

ed. To establish an average cost based on operations, under similar conditions on other waterways, it has been assumed as typical that the through traffic of this section will be carried in 8-barge tows handling 3,500 revenue tons, pushed by 1,000 horsepower towboats. (Id. ¶ 66, p. 25.)

The locks . . . are 110 feet by 600 feet with 13 feet over the lower miter sills. These dimensions were chosen so that tows now moving on the connecting waterways, Warrior-Tombigbee, Tennessee, Ohio, Mississipi, Missouri, and Illinois Rivers, could utilize the connections without double tripping through the locks, thus the economics inherent in the movement of commodities in large-sized tows would be available to the commerce prospective for movement through the Tombigbee-Tennessee waterway. (Id. ¶ 106, p. 40).

In general, the waterway would have a project depth of 9 feet with 1 foot overdepth and a bottom width of at least 170 feet. In the divide cut, . . . a width of 150 feet with passing places 200 feet wide at least every 4 miles would be provided. The project depth in the divide cut . . . would be 12 feet with 1 foot overdepth . . . . The passing places would each be 1,000 feet long and 200 feet wide . . . . These passing places would all be located so that they could be utilized as part of a broader channel if it were desired to widen the cut at some future date. (Id. ¶ 109, p. 41).

The Board recognized that the estimates contained in H. Doc. 269 were "largely out of date" because of sweeping changes brought about since the country's involvement in war, and that

> [t]ransportation facilities of every kind have been taxed almost to capacity. . . . Consequently, it has been necessary to . . . canvass the latest and most reliable sources of information on the past, present, and probable future flow of traffic, in order to predict with confidence the type and size of facilities required and the function of the proposed project in the pattern that will be assumed by postwar commerce. (Id. ¶ 138, p. 52).

The Board recommended that the United States undertake the construction of the TTW waterway along the route previously designated

> so as to provide a channel of not less than 9 feet in depth and a minimum bottom width of 170 feet in river and canal sections and 150 feet in the divide cut, with locks 110 by 600 feet clear inside dimensions. (Id. ¶ 147, p. 55).

TTW was thus designed as a navigational project for two-way barge traffic to connect the north-flowing Tennessee River with the south-flowing Tombigbee River so as to provide a continuous waterway from the Tennessee, upper Mississippi and Ohio Valleys to the tidewater Port of Mobile on the Gulf of Mexico. The territorial limits of the TTW, however, extended northward from Demopolis, Alabama, on the existing canalized BWT, a separate navigation project, upstream via the Tombigbee River, East Fork of the Tombigbee, Mackeys Creek, with a deep cut through the divide into Yellow Creek, then to the Pickwick Pool in the Tennessee River near the common boundary of the states of Tennessee, Alabama and Mississippi. The original overall project length — Demopolis to Pickwick Pool, corrected by cutoffs — was 260 miles.

H. Doc. 486 provided, among other things, that the plan of improvement investigated

> presupposes the construction of the new authorized lock and dam at mile 218.1 upstream from Mobile, near Demopolis, Ala., with normal upper pool at elevation 74.13 and a lock chamber 110 by 600 feet and with 13-foot depth over the lower miter sill. (Id. ¶ 102, p. 34).

H. Doc. 486 discussed the plan of the project's operation in the following terms:

> The function of the canal and its connections as a through route between the Gulf of Mexico and the Ohio, upper Mississippi, Missouri, and Illinois Rivers involves the construction of a canalized channel and locks of standard dimensions, to permit the transit of tows of normal size without breaking formation. The plan assumes the replacement of existing locks 1 to 7 on the Warrior-Tombigbee waterway as planned in House Document 56, Seventy-third Congress, and House Document 276, Seventh-sixth Congress, as warranted improvements of the existing Warrior-Tombigbee waterway. (¶ 136, p. 51).

(b) *The Authorizing Legislation*

The waterway was congressionally authorized by Pub.L.No.79-525, 79th Cong., 2d Sess., enacted July 24, 1946, and reads as follows:

> That the following works of improvement of rivers, harbors, and other waterways are hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and super-

> vision of the Chief of Engineers, in accordance with the plans and subject to the conditions recommended by the Chief of Engineers in the respective reports hereinafter designated:
>
> . . . .
>
> Tombigbee and Tennessee Rivers, Alabama and Mississippi; House Document Numbered 486, Seventy-ninth Congress.

House Doc. 486 was thus incorporated by reference into the authorizing statute. The Chief of Engineers, in submitting the report, recommended approval of the project

> substantially in accordance with the general plan presented in this report with such modifications thereof as in the discretion of the Secretary of War may be advisable. House Doc. 486, Report of Chief of Engineers, p. 3.

(c) *Existing Navigation Projects Having Relationship to TTW (as of 1946).*

House Document 486 discussed the relationship of the TTW with connecting waterways in terms as follows:

> A connection via the proposed route would afford an additional means of interchange of commerce between the Gulf Intracoastal and the Warrior-Tombigbee waterways on the one hand, and the Tennessee, Ohio, and Mississippi River systems on the other . . . . The Gulf Intracoastal Waterway is a sea-level channel dredged through bays, sounds, coastal lakes, and canals. These channels have minimum project dimensions of 125 feet in width and 12 feet in depth. The authorized projects for the Warrior-Tombigbee waterway, the Tennessee, the Ohio, the Mis-

souri, and the Mississippi Rivers provide for depths of at least 9 feet. The port of Mobile is connected with the Gulf of Mexico by a dredged channel 32 feet deep and about 30 miles long through Mobile River and Mobile Bay. (H. Doc. 486, ¶ 5, p. 5).

Warrrior-Tombigbee Waterway –

The Warrior River is formed by the confluence of the Locust and Mulberry Forks about 20 miles west of Birmingham, Ala., and flows southwestwardly 178 miles, entering the Tombigbee River just above Demopolis. From its source to Tuscaloosa, Ala., a distance of 47 miles, the river is known as the Black Warrior River and from Tuscaloosa to Demopolis it is known as the Warrior River. Throughout this report the term "Warrior" will be understood to cover both sections of the river. . . . Below Tuscaloosa the project on the Warrior-Tombigbee waterway provides for a year-round channel 9 feet deep and 200 feet wide to be secured by the construction of a series of locks and dams. (Id. ¶ 6).

Tennessee River–

The Tennessee River is formed by the confluence of the Holston and French Broad Rivers near Knoxville, Tenn., and flows southwestward to a point on the Alabama State line near the Georgia boundary. From there it crosses into Alabama and flows westward across the northern part of the State to the intersection of the Alabama, Mississippi, and Tennessee boundaries; thence it turns northward across Tennessee and Kentucky and empties into the Ohio River at Paducah, Ky.

> . . . The Tennessee Valley Authority has provided a comprehensive development for navigation, power, and flood control. A series of 10 locks and dams provides a year-round 9-foot navigation channel with a standard 2-foot overdraft to Knoxville. In the construction of locks 110 by 600 feet on the Tennessee River, provision was made for the future construction of auxiliary locks 60 by 360 feet, and in the construction of locks 60 by 360 feet, provision was made for the future construction of locks 110 by 600 feet.

Report of Board of Engineers for Rivers and Harbors, p. 5-6, House Document 486.

(d) *Post-Legislative Occurrences (1950-67).*

In 1951, as a result of a report by the investigative staff of the House Appropriations Committee, the TTW, the plans of which were then only partially completed, was placed in a "deferred-for-restudy" category. The essence of the investigative report was that the dimensions specified in the 1939 and 1946 House Documents, other than provision for 110 by 600′ locks, were inadequate for 2-way navigation of 8-barge tows, and the Chief of Engineers should submit cost estimates for a 300′ channel throughout pursuant to the Corps' ultimate plan. (Plt.Ex. 85). General Pick, Chief of Engineers, took issue with the criticism for the Corps' not submitting estimates of costs for developing a waterway with a 300′channel throughout, while providing for larger locks and a wider divide cut. On April 23, 1951, he advised the Appropriations Committee:

> The Corps of Engineers has not recommended a 300 foot waterway and would never so recom-

> mend unless there developed sufficient traffic to justify the cost of increasing channel dimensions. The Tennessee-Tombigbee Waterway is authorized for a width of 170 feet. To increase this width to 300 feet would require additional authorization by the Congress. This is in accordance with the normal procedure of Congress in authorizing improvement of waterways to meet existing needs; and of subsequently authorizing increases in scope when the growing demands of commerce made such action necessary. The authority delegated to the Chief of Engineers by Congress to make necessary modifications of authorized projects does not extend to major increases in project scope, such as that which would be involved in widening the Tennessee-Tombigbee Waterway. (Plt.Ex. 34, pp. 3-4).

Project funds were revoked and planning studies discontinued. Matters remained in this status until the passage of the 1957 Public Works Appropriation Act, which mandated a restudy of the TTW with a view of determining the economic justification of the waterway. This task was primarily assigned to the Corps' district engineer at Mobile. The restudy, labeled Design Memorandum No. 1 (GDM 1), was completed June 30, 1960; it was approved April 12, 1962, by the Chief of Engineers and submitted to Congress. The restudy recommended certain changes in the previous design, notably reducing the number of locks from 18 to 10, and reducing the project's length from 260 to 253 miles. GDM 1 affirmed that the waterway was

> planned with channel dimensions to permit two way navigation by tows composed of six 35- by

195-foot barges, plus towboat, having over-all dimensions of about 70 by 735 feet. The above tow size was adopted as the maximum practicable for general use after a review of the proposed plan and discussion of the waterway's characteristics with tow-boat operators experienced in navigating confined channels. (GDM 1, ¶ 49, p. 20). Lock dimensions authorized for the plan of improvement are 110 by 600 feet clear, with 13 feet over the lower miter sills. These dimensions are comparable with those completed or under construction on the Tennessee and Warrior-Tombigbee River projects. The 70- by 735-foot tow described above can be locked through a 110- by 600-foot chamber in a single operation by a "set-over" lockage, whereby the towboat is set alongside the barges while locking. This practice is not uncommon on the Ohio River and other waterways. (¶ 50).

Authorized dimensions are 9 by 170 feet in the river section and 12 by 170 feet in the canal and divide sections except in the divide cut itself where dimensions are to be 12 by 150 feet. In the canal and divide sections, passing places 240 feet wide, 1,000 long with 500-foot-long transitions at each end would be placed 4 miles apart; upstream and downstream lock approaches would be widened also. The passing places are spaced so as to occur near the end of each hours run for the average tow. During design stages consideration will be given to eliminating the passing places except at lock approaches, and providing a 9 foot by 200 foot channel in the river section, together with 12 foot deep channels in the canal and

> divide sections which will have a width of 200 feet at a 9 foot depth under minimum pool conditions. Present indications are that such channels can be constructed within the economic limits of the project. (¶ 52, p. 21).

The restudy emphasized there should be provision for future development, for in ¶ 64, it is stated:

> As a result of planning studies conducted prior to the time the project was classified as "deferred-for-restudy," the governing criteria adopted for the project stipulated that all structures would be planned so as to permit future enlargement of the channel to a depth of 12 feet and minimum bottom width of 300 feet. Of the total estimated cost of the project, about $1,400,000 represents added cost resulting from provision for future enlargement. Should future conditions warrant, the waterway could be enlarged with a minimum disruption of waterway traffic. (p. 25).

As a result of the 1960 restudy, the Corps recommended that the general plan of improvement as therein proposed, GDM 1, be approved, subject to such modifications as the Chief of Engineers may deem advisable, and that the authorized project be restored to an active status. This restudy was reported to Congress with a positive benefit/cost ratio of 1.08 to 1 calculated on the basis of a 2-5/8% interest rate.

The 1965 Public Works Appropriation Act, which Congress enacted August 30, 1964, authorized reevaluation of the economics of the TTW. The district engineer at Mobile completed reevaluation of the project's economics on June 30, 1966, in a document designated as Supplement to GDM 1. The scope of the report included a reexamination

of the project plan to determine its capability for handling modern barge traffic, particularly with respect to channel widths, and to determine the project width which would yield maximum excess of benefits over costs. Cost estimates were made for both 200′ and 300′ (with in actual divide cut would be 20′ less in both cases considered). No estimate, however, for the 170′ project was prepared "since that width would unduly restrict tow size and would not be comparable to the connecting channels in the Tennessee and Black Warrior-Tombigbee waterway" (¶ 9, Supp. to GDM 1). Although the 170′ channel width providied in GDM 1 was "designed to permit 2-way navigation by a tow composed of six 35- by 195-foot barges (2 abreast, 3 in tandem) plus towboat, the tow having an overall length of 735 feet and width of 70 feet," (¶ 13, p. 4) reevaluation conferences between representatives of the Office, Chief of Engineers, Board of Engineers for Rivers and Harbors, Division Engineers, South Atlantic Division and Mobile District Office, resulted in adoption of minimum channel widths for 2-way navigation as follows:

Barges per tow (35′ X 195′)	Width of tow	Bottom Width of Channel[1]
3	70′	170′
6	70′	200′

[1]20 feet less in divide cut.

The above widths were considered to give satisfactory clearance between maximum size tows as provided above for 2-way traffic.

> Although the section ratios in the canal section and divide cut would be somewhat smaller than 4.5 to 1 for maximum size tows loaded to capacity, under actual operating conditions and considering the many and variable sizes of tows and

> operating drafts under varying loads, channel dimensions adopted for each tow size investigated should be adequate for the prospective traffic. (Supp. to GDM 1, ¶ 14, p. 4).
>
> Preliminary analysis of barge rate factors and comparison of rates, Tennessee-Tombigbee versus the Mississippi River alternative route, indicated that traffic limited to a 3-barge tow via the Tennessee-Tombigbee could not compete with the Mississippi River waterway carrier rate where much larger tows are employed. Accordingly, construction cost estimates were developed for project widths of 200 feet and for 300 feet (20 feet less in the divide cut). Benefits have also been developed for these widths, based on utilization of larger tows. (Id. ¶ 15, p. 4-5). Navigation benefits were computed on the basis of using 6-barge tows on the 200-foot project and 8-barge tows on the 300-foot project. The 300-foot project would enable waterway carriers to operate 8-barge tows in two-way traffic, and the locks would accommodate an entire 8-barge tow, with towboat, without requiring any alteration of the usual tow formation. (Id. ¶ 21, p. 7).

This study concluded that the 300′ channel would project a positive cost/benefit ratio of 1.24 as against a ratio of 1.10 for a 200′ project. The district engineer concluded his report by stating that:

> the most practicable plan of improvement consists of a channel with bottom width of 300 feet (280 feet in the divide cut) and that the project is economically justified when all tangible, intangible, and secondary benefits are taken into consideration. Accordingly, he recommends approval

> of the plans and estimates presented herein. (Id. ¶ 37, p. 13).

The report contained no recommendations that Congress enact legislation to approve the enlarged dimensions proposed in the 1966 economic reanalysis. In the interval since 1960, 8-barge tows had become common navigation configurations on the Tennessee River, as well as on the Ohio and Mississippi, all of which had minimum authorized channels of 300′ width and 9′ depth. The BWT, south of Demopolis, however, still remained with no more than a 200′ authorized channel width, and limited lock capacity. Both of these factors precluded efficient navigation of 8-barge tows on that waterway. In recognition of this, the reevaluation report included in the cost of the TTW project "adding duplicate locks at the Jackson and Demopolis projects when the combined traffic on the Black Warrior-Tombigbee and Tennessee-Tombigbee exceed the capacities of the single locks at those locations." (Id. ¶ 19, p. 6)

On October 6, 1966, General William F. Cassidy, Chief of Engineers, sent a memorandum to the Special Assistant to the Secretary of the Army for Civil Functions enclosing copy of the 1966 economic reevaluation report. The Chief of Engineers tentatively approved widening the waterway to a 300′ channel as the basis for further planning. The Chief of Engineers, making reference to the discretionary authority vested in the Secretary of War (Army), stated that the Secretary's approval "will be necessary prior to proceeding with detailed design of a 300 foot waterway." He concluded as follows:

> [I]n addition to requesting your clearance to issue my tentative findings on the economic reevaluation of the Tennessee-Tombigbee Waterway project, I also request the tentative approval of the Secretary of the Army to enlarge the

> waterway to 300 feet, with final approval of the enlargement to be contingent on a favorable finding by the Chief of Engineers after consideration of the views and comments of proponents and opponents of the waterway. (Deft. Ex. 33).

On October 26, 1966, Alfred B. Fitt, Special Assistant to the Secretary of the Army for Civil Functions, issued a memorandum that the Secretary of the Army tentatively had given his approval to the 300′ width recommended by the reporting officers and requested the Chief of Engineers to issue tentative findings on the economic reevaluation of the project. (Deft. Ex. 34).

On November 3, 1966, the Chief of Engineers issued a public announcement that an economic reevaluation of the waterway project had been made in response to a directive of the House Appropriations Committee in its report on the Public Works Appropriations Act, 1965. The notice advised that the Corps had considered minimum widths of 200′ and 300′ and concluded that the project was economically justified with either width but was better justified with the 300′ width. Interested parties were invited to present their views and comments concerning the report to the Chief of Engineers within 30 days from the date of this announcement to receive consideration prior to the submission of the Chief of Engineers' final views to the Appropriations Committees of the Congress. (Deft.Ex. 36).

This economic reevaluation report was submitted to Secretary of War Stanley Resor by General Cassidy on March 20, 1967, who stated:

> The District Engineer, Mobile District, and the Division Engineer, South Atlantic Division, find that the project is economically justified. The plan for the authorized project provides for a

253-mile canalized waterway joining the Tennessee and Tombigbee Rivers to serve barge navigation. The project would provide a maximum depth of 9 feet. Five locks and dams and five separate locks are planned to provide a slack-water route over the 341-foot drop in elevation from the Pickwick Pool on the Tennessee River to the Demopolis Pool on the Tombigbee River. Minimum width of 200 feet and 300 feet were given detailed consideration. The 170-foot width contemplated at the time of project authorization was given only minimum consideration as being inadequate for the volume of commerce and the size of barge tows expected to use the waterway. The reporting officers concluded that the project is economically justified with either the 200- or 300-foot width but is better justified with the 300-foot width. The estimated first cost of the project with a 300-foot width is $316 million, of which $239 million would be Federal. The ratio of average annual benefits to average annual cost, over a 50-year economic life, was estimated at 1.24 to 1 by the reporting officers.

After a careful review of the report submitted by the Division and District Engineers, I issued a public announcement on 3 November 1966 tentatively concurring in the findings of the reporting officers and inviting the written views and comments of interested parties concerning the report and its findings. The data submitted in response to the public announcement have been reviewed and evaluated, and I hereby confirm the earlier finding that the 300-foot wide waterway is economically justified with an estimated benefit-

> to-cost ratio of 1.24 to 1. I further recommend that you exercise your discretionary authority under the 1946 River and Harbor Act to approve an increase in the project width from 170 feet to 300 feet so that further planning may proceed on the basis of a 300-foot wide waterway. (Plt.Ex. 6).[4]

(e) *Exercise of Discretionary Authority.*

Ten days later, March 30, 1967, Secretary Resor executed the following document:

> Under the discretionary authority of the River and Harbor Act of 1946 (Public Law 525, 79th Congress), I approve an increase in the width of the Tennessee-Tombigbee Waterway from 170 feet to 300 feet so that further planning may proceed on the basis of a 300-foot wide waterway. (Plt.Ex. 7).

Simultaneously therewith, the Secretary of the Army furnished a copy of the report to the Chairmen of the House and Senate Public Works Committees and Appropriations Committees. A copy of the Secretary's memorandum of March 30 was also forwarded to the Chairmen of the aforesaid committees. The Bureau of the Budget was

[4]Although it is apparent that both the 1966 reevaluation report and General Cassidy assumed a positive BCR was based upon navigation benefits of 8-barge tows operating between the Tennessee River and Mobile, this assumption did take into account reduced tow speeds, and hence lesser navigation benefits because of existing constraints of the BWT south of Demopolis to 8-barge tows. The Corps assumed it had existing authority unde 33 U.S.C. § 5 to eliminate these constraints because of three factors: (1)the BWT authorized width was for 200′ only; (2) the authorized lockage capacity was insufficient for such tows; and (3) sharp bends and turns in the BWT would impede efficient 8-barge navigation. Congress had not been requested to grant authority to eliminate these limiting conditions on the BWT.

likewise advised (Plt.Ex. 4). In the Secretary's letter of transmittal, he pointed out that although the economic reevaluation report recommended a 300′ channel width with an estimated benefit-cost ratio of 1.24, the project was only marginally justified. The congressional committees, upon receipt of the report, took no action on the recommendations, and no authorizing legislation was requested of or adopted by the Congress.

On April 4, 1967, the Chairmen of the Public Works Committees of the House and the Senate advised General Cassidy that $500,000 would be allocated from available funds to permit resumption and continuation of the preconstruction planning and design through fiscal 1968. (Deft.Ex. 47 and 48).

(f) *Project Developments After 1967.*

Continuing studies by the Corps revealed that restrictive bends in the BWT below the Demopolis lock prohibited the efficient utilization of 8-barge tows as planned for the overall project and that elimination of such bends would require 31 miles of cutoffs. Nevertheless, an EIS for the 300′ wide TTW was filed April 20, 1971, and received administrative and congressional as well as judicial approval. *EDF v. Corps of Engineers, supra.* Congress first appropriated construction funds for TTW in the fiscal year 1971 and continued to do so annually thereafter.

In October 1975, the Corps conducted studies of project costs and benefits (Plt.Ex. 13) for the purpose of furnishing an up-to-date economic feasibility review of the waterway. In this document the division engineer acknowledged "as the benefit analysis progressed it became apparent that additional considerations beyond the

presently conceived project would affect the viability of the waterway. These additional considerations govern physical improvements that would be required on the Tombigbee River below the juncture of that river and the Warrior River."[5]

The 1975 study dealt with all aspects of increases in costs and revealed that A.T. Kearney, Chicago management consultant, had been selected in February 1975 to update the navigation benefits. Based upon Kearney's report, annual commerce moving over the waterway is projected to increase from 28 million tons for the initial year of the project to 99 million tons by the fiftieth year of the project. The Corps' reanalysis was concerned with project modifications which impacted on the Tombigbee River below Demopolis (BWT). These considerations consisted of three elements: (1) duplicate locks at Demopolis and Coffeeville; (2) channel improvements from Demopolis to Mobile; and (3) relocations between Demopolis and Mobile. The 1975 report concluded:

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[5]Directly bearing upon the Corps' concern was an adverse ruling handed down September 6, 1974, by the United States District Court of the District of Columbia, in *Atchison, Topeka & Santa Fe RR Co. v. Callaway,* 382 F.Supp. 610 (D.C.D.C. 1974), that the Corps was without legal authority under 33 U.S.C.§ 5 to construct a new lock and dam which would more than triple the traffic capability on the upper Mississippi River. This action, familiarly known as the Locks and Dam 26 case, held that such a project required specific authorization from Congress under 33 U.S.C.§ 401.

Section 5 authorizes the Secretary of the Army, upon recommendation of the Chief of Engineers, to effect reconstruction of waterways essential for existing navigation, while § 401 makes it unlawful for the Corps to make any new structures in any navigable water of the United States until the consent of the Congress has been obtained and the plans have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army.

> As a result of the in-depth review of the presently conceived project, the various alternatives, and with particular attention directed to the drastic cost increases, the problem of proper authorization for the Tennessee-Tombigbee has now become the main concern. At this point it should be noted that in the Senate Appropriation Committee hearings of 1971 a description of the presently conceived project was presented by General Free, Division Engineer. Based on this we consider that disclosure has been made as to the changes incorporated into the present project. Recognizing that the increases in cost have created a difficult situation in respect to authorization and with cognizance of the testimony of the chief of engineers in Senate hearings on appropriations in 1975 concerning the GAO review of escalating cost we feel that attention must be directed to the question of authorization. (Plt.Ex. 13, p. 8).

Corps personnel considered several alternative actions and tentatively decided to continue construction of the TTW project "for which we have firm authority" (300′) and "seek authorization for the preferred expanded project" of a 300′ wide channel dimension with duplicate locks and cutoffs from Demopolis to Mobile. In September 1975, Corps officials from the Mobile and Nashville Districts, the South Atlantic Division, ORD and OCE met in Atlanta and agreed to analyze several plans for benefits and costs. There ensued a restudy of project costs and benefits which was submitted to the office of Chief of Engineers February 12, 1976 (Plt.Ex. 38), recommending prosecution of the construction of the authorized project for the TTW (Plan A) and the preparation of a feasibility report to investigate the additional navigational works contemplated under Plan C. Plan A consists of the TTW

project extending from Demopolis to Pickwick, with main channel dimensions in the river section of 300′ width and 9′ depth, in the canal section 300′ width and 12′ depth, and in the divide section 280′ width and 12′ depth with a series of navigation locks and dams. Plan C contemplated additional navigation work downriver from Demopolis on the BWT, e.g., provision for cutoffs, channel widening, bend easings, bridge modifications and provision for duplicate locks at the Demopolis and Coffeeville Locks and Dams in order that authorization of those modifications may be presented to Congress (Id. ¶ 76, p. 40). This report included a statement that recent studies of the existing navigation channel downstream from Demopolis revealed "that 8-barge tows would be impracticable because of channel widths, curvature or configuration at 44 locations and the clearances at 3 bridges spanning that reach. Since these constraints to traffic would impose limitation on traffic volume, tow sizes and tow speeds [for a length of 217 miles], early in the project life this second reevaluation was identified for study." (Id. ¶ 15, p. 7). This report was the result of General Morris, Chief of Engineers, having directed that the restudy effort be completed by November 17, 1975. The division engineer, Major General LeTellier, directed the Mobile district engineer to include in the restudy an analysis "of the currently authorized project (300′ waterway without duplicate locks at Demopolis and Coffeeville and without channel improvements below Demopolis Pool) and the ultimate proposed project (300′ waterway with features excluded above)." (Plt.Ex. 23).

On November 25, 1977, the office of the Chief of Engineers, acting by Major General McGinnis, concurred with the recommendations of the division engineer, stating

> in view of the fact that the 300-foot project is authorized and under construction, the 200-foot

alternative can be eliminated as an alternative in the Black Warrior-Tombigbee study. (Plt.Ex. 32).

(g) *Appropriations to the Waterway Project.*

On November 8, 1968, Robert E. Jordan, III, Special Assistant to the Secretary of the Army for Civil Functions, issued a memorandum to the Secretary of the Army recommending the waterway as a new construction start for fiscal 1970. However, the Appropriations Committee made its initial recommendation for new construction start in fiscal 1971 in the amount of $1,000,000. The justification sheet for the initial appropriation (Deft.Ex. 38) was based upon a length of 253 miles, bottom widths of 300′ in the river and canal sections and 280′ in the divide section, depths of 9′ in the river section and 12′ in the canal and divide sections, and for 10 single lift locks. This justification sheet contained a paragraph headed "Major Design Changes Since Project Authorization:"

> The project plan for Gainesville Lock and Dam proposed in the authorizing document has been modified to effect a reduction of the number of navigational structures required and to secure better hydraulic and construction conditions. In the authorized plan the river section of the waterway provided for a series of 7 locks to accomplish the required lift from the Demopolis pool to the canal section at Amory. In studies for the plan presented in the general design memorandum covering the entire waterway it was found feasible to eliminate 3 intermediate river section locks and dams by increasing the lift at the remaining 4 locks and widening the navigation channel from 170 to 300 feet. (Deft.Ex. 38).

The requested funds were included in an omnibus appropriation act for fiscal year ending June 30, 1971, to the Corps of Engineers for Civil Works made by Congress. Pub.L.No.91-439, 84 Stat. 890. Each year thereafter justification data showing the length, depths and bottom widths of the waterway were submitted to the Appropriations Committees with requests for additional TTW construction funds for inclusion in omnibus appropriation grants. The Corps allocates funds to TTW out of annual congressional appropriations. The allocations made by the Corps to TTW through fiscal year 1979 total $582,668,000. For the fiscal year 1980, the Corps has requested the sum of $165,000,000 for the TTW. Omnibus appropriations to the Corps, for fiscal year 1971 and each year thereafter, typically are for gross sums appropriated "for the prosecution of river and harbor, flood control, shore protection and related projects authorized by law; and detailed studies and plans and specifications . . . (but such studies shall not constitute a commitment of the Government for construction): $851,256,000 [with sums varying in each year] to remain available until expended. Provided that no part of this appropriation shall be used for projects not authorized by law or which are authorized by law limiting the amount to be appropriated therefor." In none of the appropriation statutes for fiscal years 1971 to 1979 is there mention of authorizing or recognizing TTW's expanded channel dimensions or design changes although several of the Acts, including the 1971 legislation, expressly authorize changes or modifications to specific projects previously authorized or under construction.[6]

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[6]Pub.L.No.92-134, 85 Stat. 365, for $927,926,0000 for the fiscal year ending June 30, 1972; Pub.L.No.92-405, 86 Stat. 621, for $1,201,493,000 for the fiscal year ending June 30, 1973; Pub.L.No.93-97, 87 Stat. 318, for $873,589,000 for the fiscal year ending June 30, 1974; Pub.L.No.93-393, 88 Stat. 782, for $973,681,000 for the fiscal year ending June 30, 1975; Pub.L.No.94-180, 89 Stat.

(h) *Publicity Attendant Upon Project Modifications.*

Prior to the submission to Congress of the 1966 Supplement to GDM 1 and Secretary Resor's memorandum purporting to exercise discretionary authority to widen the channel, the House of Representatives, while resolved into a Committee of the whole House, was advised by Congressman Whitten that "indications are that [TTW] will likely be between 250 and 300 feet wide," 112 Cong.Rec. 23374 (1966) (Deft.Ex. 43, Attachment 5). On June 24, 1970, Congressman Whitten advised the full House of Representatives that the TTW "will provide a 9 foot slack water navigation channel with bottom widths of 280 feet in the divide cut and 300 feet in the remainder of the route." 116 Cong.Rec. 21252 (1970) (Deft.Ex. 43, Attach. 17). Before requesting discretionary authority from Secretary Resor in 1967, the Chief of Engineers had caused public notice to be given of the modification to a 300 foot wide channel, public hearings were held, and project opponents given a chance to voice their objections. In fact, the American Association of Railroads, as early as May 18, 1967, expressed their position that Congress should reappraise the project authorization because of the recommended increase in width. Hearings on Public Works for Water and Power Resources Development and Atomic Energy Commission Appropriations for Fiscal Year 1969 before a Subcomm. of Senate Comm. on Ap-

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1035, for $1,228,648,000 for the fiscal year ending June 30, 1976, plus $408,741,000 for the period between July 1, 1976 through September 30, 1976; Pub.L.No.94-355, 90 Stat. 899, for $1,436,745,000 for the fiscal year ending September 30, 1977; Pub.L.No.95-96, 91 Stat. 797, for $1,523,820,000 for the fiscal year ending September 30, 1978; for the fiscal year ending September 30, 1979, H.R. 12928 approved by Congress for $1,342,147,000 was vetoed by the President on October 5, 1978; the House of Representatives sustained the veto on October 5, 1978. The President has, reportedly, included in the 1980 budget the requested allocation of $165,000,000.

propriations, 90th Cong., 2d Sess. 2054, 3235 (1968) (Deft.Ex. 43, Attach. 8). The Corps made full public disclosure of its 1966 economic reanalysis for modifying the channel dimensions of the waterway, and withheld from the Congress or the public no material facts regarding the TTW project. However, prior to the 1974 Locks and Dam 26 decision, the Corps had assumed it possessed general statutory authority to effect modifications to eliminate existing constraints on the BWT at such time as might be necessary in order to handle the volume of the traffic moving on the completed TTW. As heretofore stated, the Corps, in March 1971, submitted a comprehensive EIS to public authorities as required by NEPA, which disclosed the 300′ channel width in the river and canal sections, and 280′ width in the divide cut, and depths of 9 and 12′. The opponents of the waterway were vocal in public opposition not only before the committees of Congress but elsewhere. During the budgetary hearings for fiscal year 1971 in the House and Senate Subcommittees on Public Works of the Committees on Appropriations, the Association of American Railroads, with representatives from L&N present, spoke in opposition to the funding of the waterway. The Senate Subcommittee also received a communication from CLEAN opposing construction of the waterway. Hearings on Public Works for Water, Pollution Control, and Power Development and Atomic Energy Commission Appropriation Bill, 1971, before a Subcomm. of the House Comm. on Appropriations, 91st Cong., 2d Sess. 391, 397 (1971) (Deft.Ex. 43, Attach. 10); Hearings on Public Works for Water, Pollution Control, and Power Development and Atomic Energy Commission Appropriations for Fiscal Year 1971 before a Subcomm. of the Senate Comm. on Appropriations, 91st Cong., 2d Sess. 467 (1971) (Deft.Ex. 43, Attach. 11).

(i) *Interpretations of the Congress and the Corps for Post-Authorization Changes.*

Both the Congress and the Corps have traditionally interpreted the discretionary authority to make post-authorization changes of waterway projects without seeking further congressional authority to be subject to certain restrictions. The general view of Congress toward the scope of this grant of executive authority was stated in a 1946 report to the House by the Flood Control Committee:

> [I]t has been the policy of the Flood Control Committee and the Congress to recognize that changing conditions often make plans obsolete, and to avoid undue rigidity they have given the Secretary of War and the Chief of Engineers the authority to modify plans as may be found necessary and desirable. The committee finds that this confidence and responsibility has been carefully exercised, and that modifications approved by the Chief of Engineers and the Secretary of War are only those which are clearly within the established policies of the Congress.

H.R.Rep.No.2165, Authorizations for Reservoirs, Levees, and Flood Walls for Flood Control, Flood Control Act of 1946, 79th Cong.2d Sess., May 29, 1946.

The Corps construed the discretionary grant to permit project changes where (a) the scope of the project, i.e., the area to be served, is not materially changed; (b) the purpose or function of the project is not materially altered; or (c) the plan of improvement is not materially changed. In case of material change in any of these respects, the established view of the Chief of Engineers and his subordinates is that congressional approval should be sought,

absent authorizing legislation that would otherwise increase the usual extent of their discretion.

After the House Appropriations committee Staff Report and the Corps' response in 1951, see p. 892, *supra,* General Pick testified before a subcommittee of the Appropriations Committee and responded to questions by the committee counsel regarding the Corps' position on its authority with respect to TTW specifically. General Pick replied as follows:

> The first point that I would like to cover here is that if the waterway is to be increased to 300 feet, it would require a resurvey and another report to be submitted to the Congress for the authorization. In the building of the Intracoastal Canal, with which I had a lot to do in Louisiana, from New Orleans to the Sabine River, we built that canal 9 feet deep with a 100-foot bottom width. It had not been completed but a very short time before it was enlarged to 125-foot bottom width and 12 feet deep.
>
> . . . . .
>
> There has been no thought given to building this waterway to 300 feet. There has been no request from the Congress to survey the waterway and produce a report for the Congress on a 300-foot waterway, nor will the Corps of Engineers take any such steps without a directive from the Congress.
>
> If that waterway is to be enlarged, I would hold immediately that we would require additional legislation.

Hearings before the Subcomm. on Deficiencies and Army Civil Functions of the Comm. on Appropriations, Part 2, 137-38 (1951) (Plt.Ex. 33).

As a result of the Appropriations Committee Staff Report, there ensued an inquiry by the Public Works Committee of the House into the scope of discretionary authority which should properly be accorded the Corps in making construction changes. A special subcommittee was appointed

> to study the policies, practices, and procedures in connection with the authorization and construction of river-and-harbor and flood-control projects and report back to the committee with the utmost dispatch its findings and recommendations thereon.

Report on the Civil Functions Program of the Corps of Engineers, United States Army to the House Comm. on Publ. Works from the Subcomm. to Study Civil Works, 82d Cong., 2d Sess. 1 (1952) (Plt.Ex. 35). In its report the subcommittee stated:

> Your subcommittee is firmly of the opinion that the administrative officer responsible for water resource project construction must have some latitude in execution because authorizations are not made on the basis of final working plans, and, of course, all contingencies cannot be foreseen. However, there is a question as to the magnitude of a modification which an administrative officer should be authorized to make without specific congressional authority to make a change.
>
> The Chief of Engineers in his testimony agreed that it was desirable for the administrative agency to return to Congress for additional specific authority when major changes were contemplated. As already pointed out the Corps of

> Engineers says the authorized plan may not be modified without additional authorization by Congress.
>
> . . . . .
>
> It would appear that the intent of Congress is that the Chief of Engineers may make minor modifications but clearly may not make major changes in a project without congressional action based upon a formal report.

Id. at 22.

The 1951 Chief of Engineers' report made a comprehensive review of the scope of executive authority to modify projects previously approved by Congress, setting forth general principles as follows:

> The Corps of Engineers recognizes that this latitude for changes and modifications of authorized projects represents an important delegation of authority, and the Corps has attempted to exercise that authority carefully. In general, the Corps of Engineers considers that there are two types of modifications:
>
> a. Modifications and changes of a project which are necessary for engineering or construction reasons to produce the degree and extent of flood protection or the extent of navigation improvement intended by Congress are within the latitude delegated to the Corps of Engineers. Examples of such changes are shift of a dam to a nearby better location; provision of a greater storage capacity required by more complete flood records; shifts in alinement of channels indicated by more detailed surveys; or changes from a concrete to an earth structure because of

lack of proper concrete aggregate. These may be considered generally as engineering modifications.

b. Moderate extensions of project scope such as those required to provide flood protection to adjacent urban areas which have developed since the project was authorized, or to provide better channel alinement or larger navigation locks to meet the needs of developing commerce. It would obviously be uneconomical and contrary to the intent of Congress to construct obsolete projects, or to omit flood protection for a part of a city when it was the intent of Congress to authorize flood protection for that city. These may be considered generally as project modifications necessary to meet changed physical and economic conditions.

. . . . .

On the other hand, the Corps of Engineers has considered that it does not have latitude to make modifications which materially extend the scope and change the functions of the project authorized by Congress. It considers that it is necessary to bring a proposed modification of an authorized project to the attention of Congress if further study after authorization shows that:

a. *The scope or functions of the project will be materially changed thereby.*

b. *The plan of improvement will be materially changed from that originally authorized by Congress.*

c. *There are special circumstances which were not known to the Corps of Engineers or*

recognized by Congress when the project was authorized.

No hard-and-fast rule can be cited as governing when a project modification should be presented to Congress for further consideration. Increased cost over the estimate presented to Congress as a basis for authorization is not necessarily a governing criterion, as the major factors giving rise to increased costs are separate and apart from the intent of Congress in authorizing an improvement, and as the Appropriations Committee of Congress are advised of cost changes year by year. (Our emphasis).

These general principles appear to have furnished continuing guidance to the Corps since their publication in 1951. As recently as 1972, the General Counsel for the Corps, when asked his opinion on authority to make a proposed modification of an unrelated project, quoted from a 1969 legal memorandum to the Special Assistant to the Secretary of the Army containing substantially the same language as that in the 1951 Chief's Report (Plt.Ex. 39), and concluded:

The above statement is considered to be an accurate general definition of the discretionary authority of the Chief of Engineers. It is a definition which has been accepted by the Congress and followed by the Corps. It is, however, a very general statement, and some clarification is helpful.

It is the view of this office that the discretionary authority given the Chief of Engineers to make post-authorization changes in projects extends only to what might be termed engineering

changes: that is, changes which involve the location, dimension, method of construction, minor variations in the allocation of storage for the various project purposes, and changes in the size and scope of the project to meet needs which differ from those which existed at the time of authorization, so long as the scope and function of the project are not materially altered. The above changes may be made for engineering reasons (i.e., differing foundation conditions) or for economic reasons (i.e., expansion of the town to be protected or larger vessels being used in waterborne commerce). The discretionary authority is not considered to include matters which materially alter the nature of the project, such as the deletion or addition of project purposes where not otherwise authorized by law, or substantial changes in the relative sizes of project purposes. Likewise, the discretionary authority does not contemplate changes in the elements of a project which embody legal relationships, such as requirements of local cooperation which are, in effect, conditions imposed by the Congress to construction of the project. Given the above guidelines, each proposed post-authorization change must be examined individually, and whether the change is or is not a permissible one is finally, a matter of judgment.

Two additional Corps documents have been presented to the court on the assertion that they establish binding guidelines upon the Corps with regard to questions of authority for project modifications. The first is a valid regulation promulgated in 1968, ER 1165-2-305 (Def.Ex. 5), which deals not with the necessity of further congressional authority but with information on significant post-

authorization project changes required to be submitted to the Bureau of the Budget for budgetary purposes. This regulation therefore sheds little light on the question before the court. The other document is a draft regulation, ER 1105-2-31, recently prepared by the Planning Division of the Corps to eventually supersede ER 1165-2-305 (Plt.Ex. 41). This draft directly addresses the question of the Corps' authority to make post-authorization changes and is the Corps' first attempt to establish quantifying guidelines on when further congressional authorization is required. (Plt.Ex. 41, App. B). The draft has not yet been adopted by the Corps, however, and indeed has yet to be reviewed by Corps Counsel, the Director of Civil Works or the Chief of Engineers.

At the trial, the views of three Corps officials were presented on the extent of the Chief's traditional discretionary authority to make project modifications. Lt. Gen. John W. Morris, Chief of Engineers, testified that in his opinion the TTW, as currently being constructed, is the project contemplated by Congress in 1946. It was his opinion that Congress "would [not] expect us to take the taxpayers' money in 1979 and build a Model-T." (Trial Trans. 865). Unless major changes had been effected in the function or purpose of the project, Congress "expected the Corps . . . to execute its programs at the time they are being executed to modern requirements," (Trial Trans. 866) not the requirements which existed at the time of authorization.

General Morris did not believe that additional congressional authorization was required for the challenged project modifications of TTW. He found his position consistent with the 1951 Corps' statements, see pp. 892 and 900-902, *supra,* interpreting that language to mean that once the TTW construction was completed, further con-

gressional authorization would be required to modify the completed project.[7] In his words, "once a project is complete, the construction monies have been expended, and so you need new authorization." Until that time, according to Morris, the Secretary of the Army retains the discretionary authority to increase project width to support the projected commerce. (Trial Trans. 869-872).

General Ernest Graves, Deputy Chief of Engineers, was of the view that if dimensions contained in the authorizing document were "found to be inconsistent with a sound design, that would be clearly the very sort of change which the words 'discretion of the Chief of Engineers' were intended to cover— [where] the design progresses after project authorization [and] it becomes clear that some aspect is not consistent with the rest of the design . . . an overall adjustment has to be made. And it is in that process frequently that dimensions get to be changed." (Graves' Dep., Trial Trans. 1581-82). Graves pointed out that the congressionally authorized lock size of 110 X 600 feet could accommodate navigation for three barges wide (105′ width) and for two-way navigation of tows that size there might be channel sections too narrow for passage (Id. 1582). Graves was of the opinion that if a "change in dimension does not have the implication of changing the scope of the project but merely is a matter of the necessary engineering design to carry out the intended purpose," congressional authorization need not be procured (Id. Trial Trans. 1933). However, Graves believed if the dimension change was not essential to conform to engineering consistency in design, congressional authorization to widen or deepen the channel should be sought (Id. Trial Trans. 1933-34).

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[7] General Morris supported this interpretation by reference to the Corps' example of the Gulf Intracoastal Waterway, a completed project, which was subsequently widened by legislative action.

The Chief of the Planning Division, Alex Shwaiko, itemized those changes to a project which have traditionally been recognized as within the Chief's authority. Initial authorization of a project, he said, means that Congress has directed that a service be performed; "their recognition of the problem exists, a solution exists, and they want that problem taken care of . . . we [then] progress into more detailed studies, that can determine . . . how best to provide the most useful and the most efficient project that can deliver that service." (Trial Trans. 1174). According to Shwaiko, changes relating to engineering, construction, economic efficiencies and physical conditions in the area warrant modifications by the Chief as may further geologic or hydrologic studies. While Shwaiko acknowledged that the authorizing legislation of a project determines the scope and function of the project, he expressed no opinion as to the extent of authority granted the Chief of Engineers and the Secretary of the Army by House Doc. 486.

(j) *Other Design Changes Since 1946.*

Apart from the change in width from 170 to 300′ in the river and canal sections and 150 to 280′ in the divide section, plaintiffs challenge certain other design changes on the TTW as being beyond the authority of the Corps.

House Doc. 486 provided that the river section was "with the exception of the cutoffs [to] follow generally the existing channel of the Tombigbee River. Only one major cutoff would be involved." (Id. ¶ 104, p. 39). The project depth for the river section was 9′ with 1′ overdraft with the exception of Rattlesnake Bend cutoff, the longest of 21 cutoffs in the river section, where a depth of 12′ with 1′ overdraft was specifically provided (¶ 109-110, p. 41).

Under current construction plans, 70% of the river section of the waterway, according to Wayne Odom, Jr.,

Chief of the Coastal Engineering and Hydraulic Design Section, Mobile District, will have a controlling depth of 9′; depths of 12′ are planned throughout the Columbus and Aberdeen Pools and in all cutoffs. Numerous cutoffs added to the design as a result of new bend widening criteria adopted by the Corps in 1973 effectively eliminate 21 miles from the length of the waterway. The Corps decided that the cutoffs were justified economically since excavation required under the new bend widening criteria would exceed that required by mere addition of cutoffs. Additionally, engineering reasons such as better information on foundation conditions, better topographical surveys and minimum desirable radii of bends justified their decision. The 12′ depths in the Aberdeen and Columbus Pools were justified by the 4.5 recommended cross-sectional ratio as an engineering change to aid in the maneuverability of barge navigation within those particular pools.

Another change from the 1946 plan was that from a perched canal above ground level in the canal section to a chain-of-lakes concept in the current design. The perched canal was to "be constructed partly by excavation and partly by levees. There would be 10 locks in the canal section. . . ." Under the chain-of-lakes design concept there are minor variations in the canal section alignment on the eastern edge of the flood plain with the major difference being the elimination of the eastern levees. The tributaries from the east will flow directly into the canal or its reservoirs without any obstruction and then be conveyed to a spillway gate to pass into the Tombigbee River flood plain to the west. Inundated area under the chain-of-lakes concept resulting from reservoirs above each of the locks in that area will encompass 8300 acres rather than 4300 acres contemplated by the 1946 plan. However, this increased inundation did not necessitate the acquisition of addi-

tional real estate since much of the acreage now to be inundated was lowland subject to periodic flooding. The chain-of-lakes concept is said to be engineeringly sound for a variety of reasons, such as providing a greater volume of water to stabilize pool levels during heavy lock operations, reducing wave action from the movement of tows, and reducing maintenance of navigational structures, including the now eliminated eastern levee. The Corps determined that the changes, apart from improvement in environmental concerns, was a more productive use of land which would have had to be acquired for the project in any event.

Plaintiffs vigorously challenge the placement of five dams in the canal section since the 1946 design did not call for dams in that area. At each of the five locks, instead of a levee on the eastern side to confine the water in the lock area, the present plans call for a dam to tie the lock into higher ground and allow the water to flow back up against the valley wall. According to Odom, "it [is] the same thing, you have just eliminated a considerable length of dam." (Trial Tr. p. 1334). Plantiffs also challenge the increased depth of miter sills on the locks throughout, since the 1946 plan provided only for 13′ dpeth on all miter sills, and the Corps has since provided for at least 15′ depth on all miter sills on all locks and up to 18′ on selected locks. According to Odom, these increased depths are necessary to allow ease of entry by vessels into the lock chamber and greater maneuverability.

Another change in the design is the construction of several dikes or causeways, one at the Yellow Creek embayment, one across the Tibbee River, and one across the Tombigbee River north of the Columbus Lock and Dam. As for the latter two structures, the evidence shows that although they are presently blocking the two rivers, when

the project is completed they will be at least 13′ below pool level and will not be an obstruction to navigation, their purpose being to control cross-currents for vessels entering the lock. In the Yellow Creek embayment, the elimination of a small inlet in the Pickwick Pool will be filled with excavated material to create a land mass. The structure will form a TVA port facility and does not otherwise obstruct navigation either in Yellow Creek or the Pickwick Pool reservoir.

II.

[1] Our jurisdiction to determine the present controversy under 28 U.S.C. § 1331 is acknowledged by the parties. We must first deal with the defenses of res judicata, collateral estoppel and laches raised by defendants as a result of the prior litigation which upheld the Corps' compliance with NEPA in planning the waterway. Under the doctrine of res judicata, "a judgment in a prior suit between the same parties bars a suit on the same cause of action not only as to all matters offered at the first proceeding, but also as to all issues that could have been litigated. Collateral estoppel, however, precludes relitigation only of those issues actually litigated in the original action, whether or not the second suit is based on the same cause of action." *Johnson v. United States,* 576 F.2d 606, 611 (5 Cir. 1978); *Stevenson v. International Paper Co.,* 516 F.2d 103 (5 Cir. 1975). Res judicata may not here apply since the present suit not only involves several parties plaintiff (L & N, National Audubon Society, Birmingham Audubon Society and the Alabama Conservancy) which were not in the former litigation, but also because the authorization issue was not within the scope of the complaint or other pleadings in the earlier case making the issue a different cause of action from those involved in the first case. The Fifth Circuit has recognized that "the

principle test for comparing cause of action is whether or not the primary right and duty and delict or wrong are the same in each action." *Stevenson, supra,* at 109, *citing Seaboard Coast Line RR v. Gulf Oil Corp.,* 409 F.2d 879, 881 (5 Cir. 1969). *See also Carr v. United States,* 507 F.2d 191, 193-94 (5 Cir), *cert. denied,* 422 U.S. 1043, 95 S.Ct. 2657, 45 L.Ed.2d 694 (1975). Clearly a challenge based upon noncompliance with environmental laws presents a different cause of action than the issue of the Corps' lack of authority to construct a channel with dimensions in excess of statutory authorization. Collateral estoppel does not apply because the issue of Corps authority was not actually litigated in the prior case. The stipulated facts in the prior litigation regarding the channel dimensions are not of sufficient force to estop the plaintiffs from bringing the present action, for collateral estoppel "is limited to [those] matters distinctly put in issue, litigated, and determined in the former action." *Diplomat Electric, Inc. v. Westinghouse Electric Supply Co.,* 430 F.2d 38, 45 (5 Cir. 1970). See *Johnson, supra,* at 615. "An issue resolved by stipulation is neither litigated nor determined by the court in the sense that the doctrine of collateral estoppel normally requires." 1B Moore's Fed.Practice ¶ 0.444[4], at 4029.

The equitable doctrine of laches, which defendants strenuously urge, is quite another matter, at least as it bears upon the discrete issue of whether the Secretary of the Army, by his memorandum of March 30, 1967, exceeded the limits of his discretionary authority in approving an increase in the width of the TTV from 170 to 300′. The challenge made to this executive action is, of course, quite different from, and independent of, the contentions of the plaintiffs that the Corps in respects other than widening the channel has made major changes in design, in excess of lawful authority, in recent years during the period of actual construction of the TTW.

[2, 3] It is settled law that the doctrine of laches applies in the context of public-issue litigation. *See Save Our Wetlands v. United States Army Corps of Engineers,* 549 F.2d 1021, 1026 (5 Cir.) *cert. denied,* 434 U.S. 836, 98 S.Ct. 126, 54 L.Ed.2d 98 (1977); *Ecology Center of Louisiana v. Coleman,* 515 F.2d 860, 867 (5 Cir. 1975), *Clark v. Volpe,* 342 F.Supp. 1324 (E.D.La.), *aff'd.* 461 F.2d 1266 (5 Cir. 1972). Courts have frequently said that the existence of laches is primarily a question of fact addressed to the discretion of the trial court upon the circumstances of the particular case. It is a doctrine based on public policy requiring discouragement of stale demands. Laches is not based upon the mere lapse of time, but is principally a question of inequity of permitting a claim to be enforced where some change in condition has taken place which would make enforcement of the claim unjust. *Davis v. Alabama Power Co.,* 383 F.Supp. 880 (N.D.Ala.1974), *aff'd.* 542 F.2d 650 (1976) (per curiam), *aff'd.* 431 U.S. 581, 97 S.Ct. 2002, 52 L.Ed.2d 595 (1977). We are further instructed by the Supreme Court:

> Though the existence of laches is a question primarily addressed to the discretion of the trial court, the matter should not be determined merely by a reference to and a mechanical application of the statute of limitations. The equities of the parties must be considered as well. Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief.

Gardner v. Panama R.R., 342 U.S. 29, 30-31, 72 S.Ct. 12, 13, 96 L.Ed. 31, 36 (1951).

[4] In the case sub judice, we find as a fact that since the present suit was not filed until November 30, 1976, a delay

of more than nine years occurred before any challenge was made to the Secretary of the Army's authority to widen the channel dimensions of the TTW. Any claim based upon the unauthorized action of the Secretary of the Army would have accrued upon the issuance of his memorandum of March 30, 1967. Courts, in considering the applicability of laches, are not to make a judgment based upon a mechanical application of the statute of limitations. However, it is to be noted that a lapse of nine years is a period of time well beyond the six-year statute of limitations provided for bringing civil actions against the United States, 28 U.S.C. § 2401(a), which is the same period prescribed by the law of the forum state, Miss. Code Ann. § 15-1-49 (1972). More than five and one-half years elapsed from the time the President of the United States presided over the dedication and groundbreaking ceremony of the TTW at Mobile, Alabama, before the filing of the present action.

Moreover, it is abundantly clear from the evidence that this considerable delay on the part of the plaintiffs was not excusable since they knew or had ample means of knowing that there existed a question of the executive authority to widen the channel. This issue was certainly known from the time that the Corps conducted public hearings on the recommendation to widen the TTW to 300′, pursuant to public notice given to all interested parties as to the impending decision of the Secretary of the Army to exercise his discretionary authority. Equally well known was that such action was based upon the Chief of Engineers, General Cassidy, concluding that the 170′ originally specified was inadequate for the "volume of commerce and the size of barge tows expected to use the waterway." *Supra* p. 895. At these hearings, opponents of the project availed themselves of the opportunity to object to widening the channel from 170 to 300′. The decision of Secretary Resor

to exercise his authority, when made, was promptly submitted to the Chairmen of the House and Senate Public Works Committees and was also conveyed to the Bureau of the Budget. In fact, as soon as May 18, 1967, the American Association of Railroads expressed their position that Congress should reappraise the project authorization because of the recommended increased in width. The plaintiffs, L & N and CLEAN, continued to voice their objections to the new design before congressional committees, making known their adverse positions as early as 1971. As heretofore found, there was full public disclosure by the Corps of its 1966 economic reanalysis modifying the channel dimensions of the waterway; no material facts regarding the TTW project were withheld from the public. When new construction start funds were initially provided in 1971, the Corps submitted a justifcation sheet disclosing the modified channel dimensions of the TTW. In March 1971, the Corps submitted a comprehensive EIS to public authorities which disclosed the 300′ channel width in the river and canal sections, 280′ width in the divide cut and depths of 9 and 12′. This EIS was widely distributed to interested parties and was well known to EDF, CLEAN and other environmental groups interested in the TTW project. A cursory reading of the EIS would have disclosed the increased channel dimensions. Anyone interested, including the plaintiffs, could have easily obtained such information if they had not been previously apprised of the changes. Moreover, EDF, CLEAN and a plaintiff class of aggrieved individuals in their 1971 suit attacking the waterway project on various environmental grounds, neglected to include in their action any question about the known exercise of authority by the Secretary of the Army to increase the waterway dimensions. The pendency of that action, brought by some of the same counsel who appear for the plaintiffs in the present suit, was widely

publicized throughout the nation, and its existence was or should have been known to all parties who are plaintiffs in the present action. Additionally, the construction start of the waterway project commencing with the Gainesville Lock and Dam and followed by other prominent segments of the work received wide publicity long before the institution of the present action. A delay of more than nine years, in our opinion, before seeking a remedy against allegedly unauthorized widening of the channel, is clearly inexcusable. Indeed, plaintiffs present no credible reason or explanation for the long delay.

The third essential prerequisite for the application of laches is whether undue prejudice has been suffered by the defendants by reason of the belated assertion of the claim. The undisputed evidence shows that the Corps has allocated nearly $600,000,000 to the construction of the project, the greater part of which has been expended to date, and various segments of the waterway are and have been for more than five years under construction.[8] The evidence shows that the function of waterway structures, whose design has been based upon a 300′ wide channel, would be compromised, and a number of structures already built would have to be reconstructed in the event the channel width was reduced to 170′. The evidence also shows that several highway bridges, representing public works largely financed by the States of Mississippi and Alabama,

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[8]According to the latest available data, percentages of completion of the various portions of the project are as follows:

Demopolis Lake	70%	Lock B	9%
Gainesville Lock & Dam	75%	Lock C	2%
Aliceville Lock & Dam	55%	Lock D	2%
Columbus Lock & Dam	38%	Lock E	1%
Aberdeen Lock & Dam	29%	Bay Springs Lock & Dam	7%
Lock A	25%		
Divide Cut	28%		

Entire Project (Deft. Ex. 39) 29%

are under construction; these bridges are so designed to accommodate flood stages for a 300′ wide waterway and would be too low for clearance during flood stage if the channel were reduced to 170′. In opposition to these considerations is the fact that, according to present cost estimates, more than $1 billion of public funds must yet be expended to complete the project. Whether these expenditures will, in fact, occur depends altogether upon future appropriations that Congress, in its wisdom and within its sole prerogative, may see fit to grant for the continuance of the project.

In this situation we are required, by the teachings of *Save Our Wetlands,* to balance the equities, considering both the expenditures which have been made and those which are required to be made if the project is to be completed, the relative positions in which the parties are found, as well as benefits that may inhere in, or be opposed to, plaintiffs' assertion of their claim that the channel dimensions are legally unauthorized. In *Save Our Wetlands,* undue prejudice was found to exist on a showing that the Eden Isles project, upon which $26 million had been expended, was substantially completed. The Fifth Circuit in this situation held laches to be an appropriate defense. The defense of laches was rejected in *Ecology Center of La., supra,* upon a finding that no more than $1 million had been spent on the construction of an interstate highway estimated to cost $667 million. Similarly, in *Inman Park Restoration v. Urban Mass Transp. Admin.,* 414 F.Supp. 99, 111 (N.D.Ga.1976), *aff'd.* 576 F.2d 573 (5 Cir. 1978), the District Court rejected laches upon the authority of *Ecology Center of La.,* saying "[a]lthough a great amount of money, time and effort has already been expended, when compared to the total amount to be spent on the MARTA project it represents only a small percentage." In this case, which was cited with approval in *Save*

Our Wetlands, 549 F.2d at 1028, n. 11, it appeared that no actual physical construction had been commenced on the segments of the project under dispute. Courts have often considered laches as a valid defense where "construction may have gone so far that for economic reasons it would be impractical or impossible to alter much of the basic plan." *Organizations United for Ecology v. Bell,* 446 F.Supp. 535, 551 (M.D.Pa.1978), and cases cited therein.

Our case, factually, fits neither the *Save Our Wetlands* decision which upheld the defense of laches, nor *Ecology Center of La.*, where the opposite result was reached. We are thus constrained to exercise that degree of discretion which must be controlled by consideration of equity and sound public policy. The issue is not without complexity because of the competing considerations presented by the evidence. With nearly one-third of the entire project completed, including certain portions of the project having been substantially finished, we are constrained to find that undue prejudice has been suffered by the defendants in the accomplishment of their statutorily charged duties. An added factor in the equation of whether prejudice is "undue" must be a consideration of the navigation and economic benefits derived from having the project completed without interruption, and at an early date, balanced against the claim that the Corps' officials have exceeded lawful power granted to them in the exercise of their discretionary authority to widen the waterway channel. Given the unique circumstances of this case, we find present all essential elements of the defense of laches, i.e., a long and inexcusable delay in asserting plaintiffs' claim and undue prejudice of such substantial magnitude as to bar plaintiffs from now seeking to litigate their claim that the channel dimensions were increased from 170 to 300′ without lawful authorization.

Candor requires us to add, however, that if laches were not an effective defense and the question of width authorization remained open for determination upon the merits, plaintiffs' challenge would deserve careful scrutiny. For, while the evidence persuades us that the terms of the authorizing statute, the scope of the discretionary authority traditionally exercised by the Chief of Engineers, and the disclosures made to Congress in 1962 by GDM 1, would clearly justify widening the channel from 170 to 200′ to allow for safe passage of 2-way tows 70′ in width, it is no less clear that widening the channel to 300′ was, in 1962, scheduled only for future development. Since the 1966 economic reanalysis recommending a channel increase to 300′ to accommodate 8-barge tows 105′ in width was never expressly approved by Congress, the question posed is whether the decision of the Secretary of the Army, based upon studies made by the Chief of Engineers and his subordinates, to accelerate the implementation of the ultimately planned channel width to 300′ was in excess of discretionary authority. Resolution of this question, one of first impression, would, of course, depend entirely upon application of the statutory language in conjunction with the long-standing guidelines imposed by the Corps upon itself with regard to discretionary authority to modify authorized projects. See pp. 908-909 *infra*.

III.

Plaintiffs also mount an attack upon various features of design changes in the waterway, wholly apart from the 300′ widening of the channel. These are challenges to the authorization for the chain-of-lakes concept in lieu of the perched canal, massive river bend cutoffs and channel alterations, canalizing and deepening of the river section, placement of dams in the canal section and providing

greater depth for miter sills on all locks — design changes which admittedly have come about since the termination of the prior suit and many of which were adopted shortly before the filing of the present suit.

We agree with plaintiffs' general assertions that "the determination of the necessity for a given improvement of navig[ational] capacity, and the character and extent of it, is for [the] Congress alone," *United States v. Chicago M., St., P & P.R.R.*, 312 U.S. 592, 596, 61 S.Ct. 772, 775, 85 L.Ed. 1064, 1069 (1941), and that neither the Secretary of the Army nor the Chief of Engineers has unlimited authority to make such modifications to waterway projects as they may choose, for such power would raise "the specter of an unlawful delegation of legislative power." *Atchison T. & S.F. Ry. v. Callaway*, 382 F.Supp. 610, 616 (D.C.D.C. 1974).

Although courts have held that plans contained in House and Senate documents authorizing a particular water project are subject to such modifications as the Secretary of the Army or the Chief of Engineers find necessary from further studies, *United States v. 2606.84 Acres of Land in Tarrant County, Texas*, 432 F.2d 1286, 1292 (5 Cir. 1970); *Thetford v. United States*, 404 F.2d 301 (10 Cir. 1968), no court has, from our research, undertaken to define the precise limits of the Corps officials' authority to make "such modifications as in the discretion of the Secretary of War [Army] may be advisable."[9]

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[9]The evidence showed that the discretionary authority conferred upon the Secretary of War in the earlier Acts was in later years conferred upon the Chief of Engineers. In any event, it is virtually conceded by defendants that the conferring of discretionary authority upon the Secretary of War (Army) carried no greater or different grant of authority than had it been conferred upon the Chief of Engineers alone.

The weight of the evidence shows that, despite contrary opinions held by some lower echelon Corps officials, the Chief of Engineers has consistently held that his authority to make changes to waterway projects without seeking congressional approval is subject to definite limitations. In summary, it was deemed necessary to bring a project change to the attention of Congress and secure its approval for the modification, if further study after the initial authorization revealed that (1) the scope of the project, i.e., the territorial area to be served, would be materially changed; (2) the purpose or function of the project, i.e., navigation, flood control, etc., would be materially changed; (3) the plan of improvement as originally authorized by Congress would be materially changed; or (4) there existed such circumstances not known to the Chief of Engineers or recognized by Congress when the project was first authorized. 1951 Chief of Engineers' report, see pp. 900-901, *supra*. That these limitations have continued to be the prevailing view within the Corps is evidenced by their application by Corps' counsel as late as 1972 and further by the proposed draft regulation ER 1105-2-31, which, though recently prepared and not yet officially adopted, is nevertheless used for guidance by many districts. The Supreme Court has held that a "consistent and longstanding interpretation by the agency charged with administration of [a statute], while not controlling, is entitled to considerable weight." *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 719, 95 S.Ct. 2427, 2442, 45 L.Ed.2d 486, 504 (1975); *Saxbe v. Bustos*, 419 U.S. 65, 95 S.Ct. 272, 42 L.Ed.2d 231 (1974).

[5] The Chief of Engineers has recognized that there are two types of modifications which are within his authority and may be exercised without obtaining congressional ap-

proval. First, modifications and changes necessary for engineering or construction reasons to produce the degree or extent of navigation improvement intended by Congress, such as the shifting of a dam to a nearby better location, shifts in alignment of channels indicated by more detailed surveys, elimination of design inconsistencies, and similar engineering improvements. Second, moderate extensions of project scope to account for developments occurring after the project was authorized, such as providing better channel alignment, including areas of new commercial or population growth not existing at the time of authorization, and generally taking steps to avoid the construction of obsolete projects. Changes of this nature ordinarily are regarded as project modifications necessary to meet changed physical and economic conditions. We hold that Pub.L.No.79-525, 79th Cong., authorizing the construction of the TTW contained no extraordinary or unusual language which would vary the authority of the Corps officials to make changes in design over and beyond the foregoing limitations without seeking additional authorization from Congress. This brings us to a consideration of whether the challenges to the recent changes in design, either singly or collectively, fall outside the scope of discretionary authority possessed by the Corps officials in accordance with the above stated principles.

(a) *Chain-of-Lakes Concept.*

[6] The major change to the canal section has been a conversion from the perched canal concept to a chain-of-lakes design. The reduction of the number of locks from 10 to 5 in the canal necessitated a larger pool above those locks since the lift provided by each lock was increased as a result. This increase in pool sizes would be accomplished more efficiently with an engineering design eliminating the

eastern landside levee and providing instead for dams to tie locks into higher ground, thus utilizing the lay of the land as a boundary of the reservoirs. This was, we think, a sound engineering design which would stabilize the pool levels and reduce maintenance in the canal section. As we have found, the chain-of-lakes concept is engineeringly sound for a variety of reasons, not the least of which is to provide a greater volume of water for pool levels during heavy lock operations and promote more efficient navigation through the locks. That the chain-of-lakes design inundates 8300 acres of land, rather than 4300 as previously contemplated, is not a significant change inasmuch as it does not necessitate the acquisition of additional real estate and because the acreage to be inundated by the pools is lowland subject to periodic flooding under the original design. We think the chain-of-lakes concept is a design well within the scope of discretionary authority of the Chief of Engineers since it is merely the incorporation into the plan of a more modern engineering concept. It does not affect either the scope or purpose of the project, nor does it materially change the plan of improvement.

(b) *Cutoffs and Channel Alterations.*

We find from the evidence that the numerous cutoffs added to the design were necessitated by new bend-widening criteria adopted by the Corps and effectively shortened the length of the waterway. These cutoffs were certainly justified from an engineering standpoint since the amount of excavation otherwise required under the new bend-widening criteria would have been much greater. This change in design, of course, did not affect the scope, purpose or plan of improvement in any material way.

(c) *Canalizing and Deepening the River Section.*

As for the plaintiff's challenges to the increase in the depth of the Columbus and Aberdeen Pools from 9 to 12′ throughout, the evidence shows that the Corps based its decision to deepen these and other portions of the channel upon the 1938 Survey Report which formed the basis for the construction plans for the waterway. This report recommended a channel depth of 12′ for the canal section, divide section and cutoffs. In conjunction with this proposal, the report found it "advisable to maintain a channel section at least 4.5 times the standard tow section." (App. II to the 1938 Survey Report, House Doc. 269, pp. 256-57). In planning the Columbus and Aberdeen Pools, the Corps found it sounder engineering to provide cutoffs rather than follow exactly the original existing river bed, thus eliminating the chief bends in the river channel. Since the numerous cutoffs were found to be engineeringly feasible and advisable, the recommendation in the survey report for a depth of 12′ was carried throughout, even in those portions of the Columbus and Aberdeen Pools where the waterway route crossed the existing river bed. The deepening of the river channel to 12′ was also recommended in the 1938 report wherever practicable in order to reduce power requirements of tows navigating upon the waterway (Id. p. 258). These changes were, without question, justified as improved engineering design and did not change the material plan of improvement. Neither the scope nor purpose of the project was at all altered.

(d) *Greater Depth for Miter Sills.*

Even though the miter sill depth was specified as 13′ in House Doc. 486, the Corps has since increased those depths to a minimum of 15′ throughout and a maximum of 18′ at some locks. The undisputed evidence is that this

was done strictly for ease of entry by a tow into a lock and greater maneuverability while locking through. Clearly an engineering change in design of this character would fall within the discretionary authority of the Corps officials.

IV.

Plaintiff's next assert that the defendants have committed several violations of 33 U.S.C. § 401,[10] by constructing several dikes, causeways and dams in the waterway project without obtaining the consent of Congress and having the plans therefor approved by the Chief of Engineers and the Secretary of the Army. The erection of two dikes, one across the Tibbee River and one across the Tombigbee River north of the Columbus Lock and Dam, as well as the installation of the structure at Yellow Creek embayment, are contended to be violative of this statute, along with the replacement in the canal section of five locks with five locks and dams.

Admittedly, § 401 was enacted by the Congress "to govern conduct of its own officers and employees as well as that of others." *United States v. Arizona,* 295 U.S. 174, 184, 55 S.Ct. 666, 669, 79 L.Ed. 1371, 1378 (1935). Accordingly, the defendants' actions must be judged by the mandate of that statute.

As previously found, the dikes or causeways across the Tibbee and Tombigbee River are structures which presently obstruct navigation, and if they were to remain in that

[10]It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army.

condition, statutory violations would be the result. The undisputed evidence, however, is that both of these causeways will directly become an integral part of the entire Columbus Lock and Dam system and will, in fact, upon the filling of the Columbus Pool be covered by 13′ of water, and be thus restored to at least their normal navigability. In addition, these particular structures will serve to control cross-currents within the Columbus Pool so as to aid maneuverability of tows in this section of the waterway. An analogous case is *Northern Transp. Co. of Ohio v. Chicago,* 99 U.S. 635, 25 L.Ed. 336 (1879), in which the city of Chicago undertook to construct a tunnel under the Chicago River. During the prosecution of the work, the city erected a coffer-dam in the river, depriving the plaintiffs of access to their property. By the undisputed proof, the erection of such a structure was necessary, if not indispensable, for the construction of the authorized tunnel. Rejecting plaintiffs' claims for damages, the Court said:

[T]he grant of power by the Legislature [to the City] to build a bridge or construct a tunnel carried with it, of course, all that was necessary for the exercise of the power.

. . . . .

In this case the coffer-dam was only a temporary obstruction. It was no physical encroachment upon the plaintiffs' property, and it was maintained only so long as it was needed for the public improvement. The tunnel could not have been constructed without it. We cannot doubt that it was lawfully placed where it was, and having thus been, that the city is not responsible in damages for having erected and maintained it while discharging the duty imposed by the Legislature, the obstruction not having been permanent or unreasonably prolonged.

25 L.Ed. at 338-39.

Cf. *Pigeon River Improv. Slide & B. Co. v. Cox,* 291 U.S. 138, 54 S.Ct. 361, 78 L.Ed. 695 (1934).

[7] It logically follows that the construction of these causeways, done in the most economic fashion as essential components of the entire Columbus Lock and Dam structure, being no more than temporary obstructions to navigation and with the ultimate purpose of improving navigation, fall outside the purview of § 401.

As for the structure in the Yellow Creek embayment area, the evidence shows that it is to be a port facility for TVA and does not otherwise obstruct navigation in the Pickwick Pool or Yellow Creek. It should be noted that plaintiffs have alleged violation only of § 401 and not § 403[11] of the same title, which prohibits "any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States." Even if a violation of §403 had been alleged, the evidence fails to show that the navigable capacity of either the Pickwick Pool or Yellow Creek was substantially affected by the land mass created in the embayment. The distinction be-

[11]The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

tween §§ 401 and 403 is clearly articulated in *Sierra Club v. Morton,* 400 F.Supp. 610, 629-30 (N.D.Cal. 1975), which held:

> Congress must have been aware of the difference between obstructions to navigation [§ 401] and obstructions to navigable capacity [§ 403]. . . . Obstructions to navigation differ from obstructions to navigable capacity. The former denotes the actual, present obstruction of navigation while the latter denotes the potential or capacity to obstruct navigation currently or in the future. Proof of the former requires a showing that navigation by specific vessels is presently obstructed while proof of the latter only requires a showing that a condition exists which would obstruct navigation over the waterway if it existed. In the latter case all that is required is proof of the condition which creates the obstruction which has a *substantial effect* on navigable capacity. (Our emphasis).

Section 401 regulates only several specific types of structures, i.e., any bridge, dam, dike or causeway. Therefore, unless the structure in the Yellow Creek embayment is found to be within one of these four categories, it is outside the scope of the statute. The evidence convinces us that the structure in the embayment area is clearly not a dike, not a dam, and not a causeway. Obviously, the land mass thus formed cannot be a bridge. A dam is commonly defined as a barrier preventing the flow of water. Webster's Third New International Dictionary; *Sierra Club, supra,* at 626-27. The term dike has been construed to mean "an embankment for controlling or holding back the waters of the sea or a river." *Citizens Comm. for the Hudson Valley v. Volpe,* 302 F.Supp. 1083, 1089

(S.D.N.Y. 1969), aff'd. 425 F.2d 97 (2 Cir.,), cert denied, 400 U.S. 949, 91 S.Ct. 237, 27 L.Ed.2d 256; *Sierra Club, supra.* A causeway is defined as "a raised road across water or marshy land with the water or marshy land on both sides of the road." *Citizens Comm.*, etc., *supra*, at 1089. We conclude from the evidence that the land mass created in this small portion of the Yellow Creek embayment is, by definition, neither a bridge, dike, dam nor causeway. Its primary effect is not to obstruct but to promote navigation, and it is manifestly clear from the record that the structure does not substantially affect the navigable capacity of either the Pickwick Pool or the Yellow Creek.

With respect to the claim that five dams in the canal section were added without authority, the weight of the credible evidence is that the original plan which called for the placing of ten locks in the canal section would have also called for levees along most of the eastern side of the waterway which had the same effect as dams in that they formed barriers preventing the flow from the canal proper and over the eastern flood plain. Obviously, a sufficient volume of water must be provided for tows to lock through without reducing the water level above the lock. We find that the eastern levees in the original design were damming structures, and performing the same function as the damming structures in the current design, but were incapable of providing sufficient pool volume to accommodate the increased lifts upon elimination of five of the original ten locks in 1960. The only difference under the present plan is that the dimensions or lengths of the damming structures have been substantially diminished to achieve the same purpose as was contemplated in the original design. We have no hesitaiton in concluding that this change in plan does not constitute a § 401 violation.

V.

Much has been said about the Corps' erroneous assumption that it had general statutory authority, under 33 U.S.C. § 5, to make navigation improvements to the BWT, which is a historically different navigation project extending southward from Demopolis to Mobile. The BWT has been in operation for many years and antedates the 1946 authorization of the TTW. The fact is that the Corps, in the face of the 1974 *Callaway* decision, has readily acknowledged that it is without authority to eliminate the constraints presently existing in the BWT project and, after proper studies, must secure congressional approval to increase the channel width, eliminate numerous cutoffs, increase lockage capacity and remove other hindrances now existing in the BWT in order to efficiently accommodate 2-way navigation for 8-barge tows. Not only do the defendants concede the necessity for congressional approval for making these modifications to the existing BWT but they further acknowledge that, assuming the future grant of such authorization, the duty will rest upon them to comply with NEPA and all other applicable laws before such navigation improvements could be made. Suffice it to say that these developments, though of recent origin, have no bearing upon the Corps' lawful prosecution of the TTW project in accordance with the current design.

Let an order issue accordingly.

APPENDIX D

STATUTES INVOLVED

42 U.S.C. § 1962d-5. Water resources development projects involving navigation, flood control, and shore protection – Construction, operation, and maintenance; limitations on estimated Federal first cost of construction; Congressional committee approval of projects; reports to Congress

(a) The Secretary of the Army, acting through the Chief of Engineers, is authorized to construct, operate, and maintain any water resource development project, including single and multiple purpose projects involving, but not limited to, navigation, flood control, and shore protection, if the estimated Federal first cost of constructing such project is less than $15,000,000. No appropriation shall be made to construct, operate, or maintain any such project if such project has not been approved by resolutions adopted by the Committees on Public Works of the Senate and House of Representatives, respectively. For the purpose of securing consideration of such approval the Secretary shall transmit to Congress a report of such proposed project, including all relevant data and all costs.

33 U.S.C. § 710b-8. Same; submission of report by Chief of Engineers

It is declared to be the policy of the Congress that the following provisions shall be observed:

No project or any modification not authorized, of a project for flood control or rivers and harbors, shall be authorized by the Congress unless a report for such project or modification has been previously submitted by the Chief of Engineers, United States Army, in conformity with existing law.

33 U.S.C. § 401. Construction of bridges, causeways, dams or dikes generally

It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans eitner before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army.

33 U.S.C. § 701m. Insufficient Congressional authorization; preparations for and modification of project

In any case where the total authorization for a project heretofore or hereafter authorized by Congress is not sufficient to complete plans that may have been made the Chief of Engineers is authorized in his discretion to plan and make expenditures on preparations for the project, such as the purchase of lands, easements, and rights-of-way; readjustments of roads, railroads, and other utilities;

removal of towns, cemeteries, and dwellings from reservoir sites; and the construction of foundations. The Chief of Engineers is also authorized in his discretion to modify the plan for any dam or other work heretofore or hereafter authorized so that such dam or work will be smaller than originally planned with a view to completing a useful improvement within an authorization: *Provided,* That the smaller structure shall be located on the chosen site so that it will be feasible at some future time to enlarge the work in order to permit the full utilization of the site for all purposes of conservation such as flood control, navigation, reclamation, the development of hydroelectric power, and the abatement of pollution.

CONSTITUTION OF THE UNITED STATES

Article I Sec. 8, cl. 3.

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;